CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH-CAROLINA.

DECEMBER TERM, 1831.

Augustus Moore v. Josiah Collins & William D. Rascoe.

An assignment made by an insolvent of all his estate, whereby some of his creditors are preferred, with a stipulation that the property shall remain in his possession, until a sale should be directed by a majority of the creditors named in the deed, is not in law fraudulent upon its face, so as to authorize the court to pronounce it void; but its validity must be submitted to a jury upon proof of the actual fraudulent intent.

Where a deed of trust was duly proved, but by reason of the death of the register was not registered within six months, but was registered as soon as a successor was appointed, it was held, *Ruffin, J. dissentiente*, that the deed was available, as if duly registered.

This was an action of Trover for a number of slaves, tried before Norwood, Judge, at Chowan, on the last spring circuit, and on *not guilty* pleaded, the case was, that the plaintiff claimed title under *James R. Creecy*, by a deed dated the 15th of September, 1829, between the plaintiff, *Creecy*, and several of his creditors, whereby, after reciting sundry debts of *Creecy*, all his property was assigned to the plaintiff upon the following trusts: "That the said *Augustus Moore*, shall, as soon as may "be convenient, or he be requested by the persons inter- "ested in the trust hereby created, or a majority of them, "expose to public sale, the whole of the aforesaid real

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"estate and negroes, and other articles of personal property to public sale at such place or places as the said "*Thomas Benbury*, &c (the *cestui que trust*) or a majority of them shall require, upon such terms as the majority may agree on, before or at the day of sale, he "the said *A. M.* having first advertised the time and place "of such sale for thirty days in the Edenton Gazette, "and such other newspapers as he may deem necessary, and the funds arising from the sale of said property, and the money or securities which he the said *A. M.* may receive by virtue of the agency and attorneyship hereby created, after retaining for all necessary "and proper expenditures, &c. shall be applied in the "following manner, to-wit: In the first place, towards "the payment of the several bills of exchange herein before described, upon which the said *T. B.* is indorser, together with all damages, interest &c. the note given to "the President and Directors of the State Bank as aforesaid, to which the said *T. B.* is security, with all interest &c." The deed then recited other debts of the same kind and proceeded as follows: "After having "discharged and paid the said debts due and owing to, "&c. should there be a surplus in the hands of the said "*A. M.* by virtue of the trust by these presents created "and established, the said *A. M.* shall in the second "place apply such surplus or residue so remaining in "his hands as aforesaid, in payment and discharge of "the said bill due and owing to the said *W. R. N.* &c. (setting out sundry other debts of the same kind) "and should there not remain in the hands of the said "*A. M.* a sufficient sum, after paying off in the first instance, the debts due &c. (the first class,) and discharge the several debts due &c. (the second class) the "said balance as aforesaid, shall be applied *pro rata* &c. "But should there remain a balance in the hands of the "said *A. M.* after paying off &c. in the order and upon "the terms aforesaid, then the said *A. M.* shall apply "the said balance to the payment of the debt due to the "said *Josiah Collins* as aforesaid, in the third place; and "in the fourth place, should there remain a balance in "the hands of the said *A. M.* after paying &c. such bal-

"ance shall be applied to the payment of the debt due to "the said *Thomas C. Wheelbee* by note as aforesaid, and "should there remain a balance after paying &c. then "the said *A. M.* shall apply such balance to the payment "of all such demands due by contract or agreement a-"gainst the said *James R. Creecy*, as may be made known "to the said *A. M.* within six months after the sale of "the said property hereby conveyed, the amount of said "demands to be ascertained by two indifferent persons, "one to be chosen by the said *A. M.* and the other by the "claimant &c. But should there not remain in the hands "of the said *A. M.* a sufficient amount of funds after pay-"ing &c. to pay off and discharge all the debts and de-"mands due and owing by the said *James R. Creecy*, "then the said *A. M.* shall make a *pro rata* application "of the said funds to such debts as shall be made known "to the said *A. M.* within the time, and ascertained in "the manner aforesaid: And it is hereby expressly "covenanted and agreed upon, by and between the se-"veral parties to these presents, their heirs &c. that the "said *James R. Creecy*, his heirs &c. shall and may re-"main in the quiet and peaceable possession of the pro-"perty hereby conveyed, until the same shall be requi-"red for the purpose of effecting a sale, for which said "last mentioned purpose, the said *James R. Creecy* doth "for himself, his heirs &c. covenant, promise and agree "to and with the second and third parties to these pre-"sents, to surrender and deliver up the same, at such "time and place as may be required. And the said *A.* "*M.* doth for himself &c. covenant and agree to and with "the first and second parties to these presents, that he "the said *A. M.* shall and will execute the trusts here-"by created according to the best of his skill and abil-"ity, and that he will execute such conveyances of the "said property &c. And it is hereby expressly agreed "upon, by and between the parties to these presents, "their heirs &c. that the said *A. M.* shall not be held "responsible for the loss, injury or destruction of the "said property &c."

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To this deed there were two attesting witnesses, one of whom only was examined by the Plaintiff. He proved, that at the date of the deed, he saw it executed by *Creecy*—that *Mr. Norcom*, a *cestui que trust*, was present—that it was not then signed by the plaintiff, and that he knew nothing of its execution by the latter, who was not present when it was attested by the witness.—The clerk of the county court of Chowan proved, that during the term of the court which commenced on the 3d Monday of September, 1829, the plaintiff produced the deed in court, when it was proved by the oath of the same attesting witness, who was examined on the trial—that the plaintiff upon its probate took possession of the deed, promising to hand it himself to the register—that the register died in December following, and no successor was appointed until March 1830—that the day after the register's death the deed was found among his papers. It was also proved, that the deed was in the possession of the register within five or six weeks of its probate, and that while it was in the hands of the register, the defendant, *Collins*, took a copy of it. There was no evidence offered that the creditors named in the deed had ever required the plaintiff to take possession of the property, or to make a sale thereof; but an advertisement was proved by the plaintiff, of an intended sale on the 21st of December, 1829. *Creecy* remained in possession of the property until it was seized by the defendant, *Rascoe*, as hereafter mentioned.

The defendants produced the record of an attachment returnable to September term, 1829, of Chowan county court, at the instance of the defendant, *Collins*, against the effects of *Creecy*, as an absconding debtor, which had been levied upon the slaves in dispute; from which it appeared, that on the 10th of September 1829, *Creecy* replevied the property levied on, by giving a bail bond to the sheriff. At the ensuing term of the county court, the third Monday of that month, *Creecy* was surrendered in discharge of his bail, and judgment by confession was entered up in favor of the plaintiff. This judgment was obtained upon the bond mentioned in the assignment, as due the defendant, *Collins*,

by *Creecy*. Upon this judgment a *fi. fa.* tested the third Monday in September, issued to the defendant, *Rascoe*, the sheriff of Chowan, and was levied upon the slaves in question, and subsequently they were bought by the defendant, *Collins*. It was admitted that at the date of the assignment, *Creecy* was indebted to an amount greater than the value of his property, and that several judgments against him must remain unsatisfied—that all the debts mentioned in the assignment were *bona fide*, and that the responsibilities therein mentioned had been incurred. There was no evidence that any of the creditors of *Creecy* accepted the deed of trust or participated in the making thereof, except that one of them, at the sale by the defendant, *Rascoe*, requested a witness to value the slaves in order to subject the defendants to the full amount.

It was insisted for the plaintiff,

1st. That the registration of the deed within six months being prevented by the negligence of the register, without the default of the plaintiff; and the registration having been completed as soon as possible after the appointment of a new register, as to the plaintiff, it was to be taken as duly registered.

2d. That the deed was delivered prior to the *teste* of the execution in favor of the defendant *Collins*, and thereby the title of the slaves in question vested in the plaintiff, so as to enable him to maintain this action.

3d. That the deed was made *bona fide*, and upon a valuable consideration, and that this was a question of intent, and a matter of fact to be tried by the jury.

On the other hand it was urged,

1st. That there was no evidence from which the jury could infer a delivery of the deed before the *teste* of the defendant *Collins'* execution.

2d. That the deed not being registered within six months of its date, nor until after the *teste* of the execution and the levy and sale under it, could not prevail.

3d. That the deed in its structure and provisions manifested an intent, which the law regarded as fraudulent against creditors not parties, nor assenting thereto; and that as this intent appeared upon the face of the deed, the judge ought to pronounce it fraudulent and void.

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1st. That the registration of the deed within six months being prevented by the negligence of the register, without the default of the plaintiff; and the registration having been completed as soon as possible after the appointment of a new register, as to the plaintiff, it was to be taken as duly registered.

2d. That the deed was delivered prior to the *teste* of the execution in favor of the defendant *Collins*, and thereby the title of the slaves in question vested in the plaintiff, so as to enable him to maintain this action.

3d. That the deed was made *bona fide*, and upon a valuable consideration, and that this was a question of intent, and a matter of fact to be tried by the jury.

On the other hand it was urged,

1st. That there was no evidence from which the jury could infer a delivery of the deed before the *teste* of the defendant *Collins'* execution.

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4th. That the plaintiff could not maintain this action, because at the time of the levy and sale the possession of *Creecy* and his right, by the terms of the deed, to hold the property, had not ceased.

The presiding judge charged the jury, that there was evidence from which they might infer, that the deed was delivered prior to the *teste* of the execution. That although the registration of the deed, after the expiration of six months might, under the circumstances of this case, have been deemed effectual, so as to cause it to enure from its delivery, had it, when proved, been left in the office of the county court, yet if it was not so left, but was taken out by the plaintiff, and not delivered by him to the register until five or six weeks after the term of the court, when it was proved, it would not in law avail against *Collins's* execution. That *Creecy* being insolvent, the deed was not *bona fide* against a creditor of his dissenting therefrom, and seeking by regular process to subject the property included in it, to the payment of his debt; and that the intent to hinder, delay and defraud creditors appeared upon the face of the deed, and made it the duty of the court to pronounce it fraudulent in law.

A verdict was returned for the defendant, and the plaintiff appealed.

Iredell and *Hogg*, for the plaintiff, argued

1. That the question of fraud should have been left to the jury, because if there was any fraud in the transaction, it could be gathered only from circumstances *dehors* the deed, upon which the judge had no authority to pronounce. That the deed upon its face was not fraudulent, notwithstanding the debtor was to continue in possession. To render his possession evidence of fraud, it must be inconsistent with the deed; whereas his possession was stipulated for, as a matter of convenience to all parties. That in this respect, there was no difference between mortgages and deeds of trust. That where the benefit and interest of the grantor were not the object of the deed, but merely incidental, a considerable interest might

be reserved to the debtor without a necessary inference of fraud. (*Trotter* v. *Howard*, 1 *Hawks* 320. *Estwick* v. *Caillaud*, 5 *T. R.* 420. *Howell* v. *Elliott*, *ante* 1 *vol.* 70. *Rob. on Fraud. Con.* 548. *Ryall* v. *Rolle*, 1 *Ves. Sr.* 348, *S. C.* 1 *Atk.* 165. *Cadogan* v. *Kennet*, *Cowp.* 432. *Brooks* v. *Marbury*, 11 *Wheat.* 82. *Vredenbergh* v. *White*, 1 *Johns. Ca.* 157. *Murray* v. *Riggs*, 14 *Johns.* 571.)

2. That the delivery of the deed to the register within the time required by law was equivalent to actual registration; and that a subsequent purchaser is affected with notice of a prior unregistered deed, altho' the first purchaser neglected to have his deed registered in due time. (*Davis* v. *Blunt*, 6 *Mass.* 487. *Farnsworth* v. *Childs*, 4 *Id.* 637. *Jackson* v. *Burgott*, 10 *Johns.* 457. *Worsely* v. *De Mattos*, 1 *Burr.* 474. 484, *Peake* 190. *Marbury* v. *Madison*, 1 *Cranch.* 161. *Ridley* v. *McGehee*, *ante* 1 *vol.* 46. *Act of* 1813, *Rev. c.* 881.)

3. That the debtor was a mere bailee of the chattels, and his possession that of his bailor; and therefore the action of trover could be sustained by the plaintiff, the trustee. (*White* v. *Morris*, 1 *Hawks* 301. *Jones* v. *Taylor*, *ante* 1 *vol.* 436.)

Gaston and *Badger*, *contra*, on the first point cited *Sturlevant* v. *Ballard*, (9 *Johns.* 347.) *Hyslop* v. *Clarke*, (14 *Id.* 464.) *Burd* v. *Smith*, (4 *Dal.* 87, 89.) 2 *Pick.* 133. *Levy* v. *Gadsby*, (3 *Cranch.* 180) *Estwick* v. *Caillaud*, (5 *T R.* 420.) *Rex* v. *Dixon*, (3 *M. & S.* 11.) *Plummer* v. *Gheen*, (6 *Hawks* 66.) 2 *Stark. Ev.* 617. 2 *Kent. Com.* 422. *Makie* v. *Cairns*, (5 *Cowan* 547.)

2. The act is express, that the deed, unless registered, shall be void absolutely against purchasers and creditors. If a deed is considered as registered, when proved and ordered to be registered, there is no necessity for registration at all. Actual notice does not render the registration unnecessary. (*Ridley* v. *Thorpe*, 2 *Hay.* 343. *McLellan* v. *Hill*, *Conf. Rep.* 479. *Neil* v. *Hosmer*, 1 *Mur.* 202. 4 *Bac. Ab. Lim. of Act E.* 6, 1 *Id. Bargain & Sale, F. Robertson* v. *Stone*, 1 *Hay.* 102. *Hood* v. *Orr*, *N. C. T. R.* 151. *Jolland* v. *Stainbridge*, 3 *Ves.* 486.—*Wyatt* v. *Barewell*, 19 *Ves.* 439. *McRee* v. *Houston*, 3 *Mur.* 429. *Cooth* v. *Jackson*, 6 *Ves.* 39.)

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3. The action of *trover* will not lie, unless the plaintiff has the right of property and of immediate possession; nor if the conversion was committed while the property was in the possession of a third person, who has some interest in it. (*Gordon* v. *Harper*, 7 *T. R.* 12. *Dean* v. *Whittaker*, 11 *Eng. C. L.* 411.)

4. The proof of the delivery of the deed before the *teste* of the execution, rests upon the plaintiff, 1st, because he makes the allegation for his own benefit, and 2d, because he is supposed to be peculiarly *conusant* of the time of delivery. (*Evans* v. *Dickson*, 6 *T. R.* 60.)

HALL, Judge.—It appears from the evidence offered in this case, that at the time the subscribing witness attested the deed of trust, *Creecy* who executed it, and *Norcom*, one of the creditors in whose favor the deed was given, were present. The deed must have been delivered to *Norcom*, or retained by *Creecy*. If it was retained by *Creecy*, until it was offered for probate, it was not executed by him until that time. Therefore it cannot prevail against *Collins*. But if it was delivered to *Norcom*, it must be understood, that he received it as the agent of *Moore*. And if *Moore* has assented to such delivery, the deed must be taken to have been executed when the delivery was made to *Norcom*. Now which is most reasonable to presume did happen? If the deed was retained by *Creecy*, the signing and sealing of it by him, and having it attested by a subscribing witness amounted to nothing. The parties afterwards, were in the same situation as they were before the transaction took place. Is it credible, that the parties intended this? *Norcom* was interested in the transfer of the property; more so than *Moore*, the trustee. Was it not more likely that the deed should be delivered to him for safe keeping, than that it should be left in the hands of *Creecy*? Why was a witness called, why was any thing done at the time, if a transfer of the property was not contemplated? I therefore coincide in opinion, with the judge of the superior court, that the circumstantial evidence was of such a character that it was proper to submit the question to

the jury, whether the deed had been delivered prior to the *teste* of *Collins' fi. fa.* If it was so delivered to *Moore*, there is an end of the question as to its execution. If it was delivered to *Norcom* as his agent, such delivery was also good. It is laid down in *Whelpdale's* case (5 *Rep.* 119) that if an obligation be delivered to another to the use of the obligee, and the same is tendered to him, and he refuses, then the delivery has lost its force, and the obligee can never after agree to it. It follows of course, that if the obligee assented to the delivery to the stranger, the delivery was good; and it must be considered the act and deed of the obligor. (*Newbern Bank* v. *Pugh*, 1 *Hawks* 198. 1 *Starkie on Evid.* 333. *Johnson* v. *Baker*. 6 *Eng. C. L.* 479).

But the judge was also of opinion, that the deed was void as to creditors dissenting therefrom, and seeking by regular process of law to subject the same property to the payment of their just demands; and that an intent to defraud such creditors was apparent on the face of the deed, and that it was the duty of the court to pronounce it fraudulent.

Deeds of trust are not often made by debtors that are quite solvent. They are commonly made with a view of better securing some creditors, and in preference of others. And were the question open, and of the first impression, I would probably coincide with the judge in this part of the case also. Because when a debtor has several equally meritorious creditors, and has not wherewith to satisfy them all, and he appropriates what he has to the satisfaction of some of them, to the exclusion of others, it is a step which may gratify his feelings, but it cannot satisfy the reasonable demands of justice, or be approved of by a correct sense of fair dealing. But the law on this subject has undergone too many editions, and taken too deep root, to admit of judicial remedy. It is a measure of justice, placed in the power of debtors, in all the States of the Union, as far as I am informed.—No doubt in the present case, the object of *Creecy* was to secure some creditors, and of course injure others. Still the creditors secured had a right to be paid their debts;

Per HALL, J. Assignments made by insolvents, whereby a preference is given to one class of creditors, are not founded in morality; and were the question *res integra*, would be declared fraudulent.

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and a deed of trust, made to effect that end, the law will not consider fraudulent. I see nothing in the deed of trust that distinguishes it from the common case of trusts. I am therefore not prepared to say, that it carries on its face proof that it is fraudulent.

The next question that arises in this case is, whether as the deed of trust had not been registered in due time, on account of the death of the register it ought to be given in evidence. It will be admitted, that where two individuals enter into a contract, and one of them is prevented, by the act of the other, from doing a thing which he stipulated to do for the benefit of the other, the latter can claim no advantage from the failure or omission. It will be admitted also, that the Legislature may contract with an individual; and that the Legislature is represented by its laws, its officers and its agents. And as far as such officers and agents act within the sphere of their official duty, they represent, and in fact are the legislative will. When they omit doing a thing which they ought to do, the Legislature by its agent has failed on its part. And if the failure was the cause, why something, stipulated to be done by an individual, was not done, no advantage can be taken of the omission by the Legislature. Otherwise, it would do that itself which it will not countenance in an individual.

Per Hall, J. Registration being required by law for the public benefit, & registers being officers of the public, if such officers are not provided, or if by their neglect a deed be not registered within the time prescribed, it is available without registration.

Generally speaking, when a contract is established, each party is entitled to the benefit of it. But to some contracts, (and the present deed of trust is one of them,) policy has annexed another prerequisite—registration. In other words, a new contract is made between the grantee and the Legislature. The Legislature represents all other persons except the parties to the deed. All other persons are bound by their stipulations. What are the stipulations in this case? They are, (in order that no person may be defrauded by the deed of trust, but all may have notice of it,) that the Legislature shall appoint a register, whose duty it shall be to register the deed of trust, and the grantee shall in due time furnish the register with it for that purpose. Now as the Legislature has failed in providing an officer, the want of registration is not to be imputed to the grantee. Nor ought the

defendant to derive any benefit from the failure; because the Legislature enacted the provision of registration for his benefit. And if through its omission, there was no register, he cannot complain. The grantee is entitled to the benefit of the deed, as if no law for registration had been made. To exact from an individual an impossibility, as the only terms on which he should be entitled to the benefit of a contract, would be to impair and destroy that contract.

I have read of a Roman Emperor, who suspended his laws so high, that it was with difficulty they could be read, for the purpose of entrapping his subjects, and collecting penalties. It would have answered the same purpose to enact, that the subject should do a particular thing, and then to have put it out of his power to do it, and claimed the penalty.

I think this action is sustainable. The plaintiff had under the deed of trust the legal title to the property in question; and the possession of *Creecy* was not adverse to it, but held under it, for the trustee.

HENDERSON, Chief-Justice, concurred with HALL, Judge.

RUFFIN, Judge, *dissentiente*.—Upon the question of fraud, I fully concur in the opinion delivered as that of the court. If the deed was intended to delay or hinder creditors, or for favor to the maker, or for his ease, even for one week or day, I should hold it fraudulent and void. And if those facts appeared on the deed itself, by a fair construction of it, I should likewise hold it to be the province and duty of the court to pronounce it fraudulent. But where the provisions of the deed point to the contrary purposes, namely, the real satisfaction of creditors in a convenient time, and in a convenient manner, or leave it equivocal whether one or the other was its object, it is then a case, where the wrong intent is not to be gathered from the acts done, as they appear in the instrument, and the court cannot determine the question. The actual intent is then open to proof *aliunde* and not being declared in the instrument, or plainly to be inferred from it, is to

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be found by the jury. And as that may be found to be honest or evil, the court will instruct the jury as to the legal consequences.

Here there seems to be nothing in the deed itself, to raise an imputation against it; unless every conveyance, by way of security of some debts, in preference to others, be void. There is no benefit reserved to the debtor, which can be supposed to have been the object, or one of the objects of making the deed. Until a sale, the possession is to remain with him. But this is obviously not for his ease—not to leave him the enjoyment of an estate, protected by this conveyance from his general creditors. It was for the convenience of the trust property, and a reasonable accommodation to the trustee; who ought not to be obliged to enter into immediate possession, take the management of the estate, and subject himself to an account. The deed was executed in September, when it is to be supposed the lands were in crop, and the slaves engaged for the year. The sale was to be at the will of the trustee, or of a majority of the creditors; and it is to be supposed, unless the contrary be proved, that the creditors would act for their own interest, and require the sale in a reasonable time. If they do not, a long continued possession by the creditor would furnish strong evidence of the original fraudulent intent. It is not to be inferred that they will not, because a majority might be under the influence of the debtor, and might, to favor him, sacrifice their own interests and those of the minority. If such be the fact, it is open to proof. It can be shown, that the apparent fairness is illusory; that the debtor had come to an understanding with a majority or a large portion, that the deed should be so used, and upon that footing made the conveyance. The actual intent would frustrate their purposes, and place the deed on a level with one having a clause of revocation by the grantor himself, with this difference only, that the latter is so expressly fraudulent, that the court does not need a jury to find the intent, but can say directly to the jury, the deed is void; while in the former, the intent can only be gathered from extrinsic evidence by the jury.

and then applied under the advice of the judge. But here there was no proof of that sort. Nor are any hard or unreasonable terms imposed on the creditors. No releases are required from them, before they can avail themselves of the trusts in their behalf; but the debtor is to be still left personally responsible for balances due. It is said, however, that the deed obviously delays *Collins*, under the pretence of securing him. For he was then pursuing an action for his debt, in which he would have a more direct and speedy method of raising the money. True, that effect does follow; and if that was the intent, it avoids the deed. But if the intent was *bona fide* to secure the debts mentioned in the deed, and in the order therein prescribed, then it is not fraudulent; although the effect may be to delay and finally to defeat *Collins*. That was not the object of the conveyance, but only a consequence of it. That consequence will not vitiate the instrument, provided it be only incidental to the other and lawful purpose, of discharging other debts in preference. That *Collins* is provided for in the deed, does not make it covenous as to him, in reference to his better remedy by judgment and execution then in prospect, more than it would, had that provision been left out. It is clear, the other creditors might have been preferred, to his entire exclusion, although his debt was then in suit. And the question then is, was the preference given to true debts, and for the real purpose of satisfying them, which to be sure may, and perhaps must produce a loss to *Collins*, or was that professed purpose feigned; and the real and primary one, in fact, to defeat another creditor. In the one case, the intent is allowed by law; in the other, it is forbidden.

Per RUFFIN, J. A creditor may in a general assignment of his property prefer one debt to another; and altho' the *effect* of this preference may be to delay a creditor, yet if such delay was not the *intent* of the debtor, the deed is valid.

It has been further contended, that this deed is fraudulent, because the surplus is reserved to *Creecy*. That is no more than would have resulted without such reservation. It will denote a fraudulent intent or not, according to the proportion the value of the estate conveyed, bears to the debts secured by the deed. If the deed covers a great deal of property as a security for a small debt, so that the resulting interest to the debtor is really the valuable

An assignment, which conveys property for the purpose of paying specified debts, with an express resulting trust to the assignor, is not on that account fraudulent upon its face.

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interest, the purpose professed is so obviously a mere pretence, as not to conceal the true purpose from the detection of any jury. It is obvious in such a case, that the debtor is providing for himself and not for his creditors. But here the whole estate of the debtor is conveyed; and the debts to be raised out of it are so large, as probably to absorb the whole, and then be unsatisfied. This circumstance therefore, cannot impugn the fairness of the transaction. Nor do I see any thing else in the case, that can, or ought, except the violation of the sound rule in morals, (which the law has not yet incorporated with itself,) which would as much constrain a perfectly honest man, unable to pay, to share his substance, impartially and equally amongst his creditors, as it would make a man of common honesty scorn to keep back a single stiver for himself.

But if the resulting trust is more valuable than the debts secured, it is a circumstance from which the jury may infer a fraudulent intent.

Upon the question about the delivery of the deed, I confess, I doubt extremely. I should hold the deed to be good, though executed in the absence of *Mr. Moore*, and though it was to be executed by him afterwards, and was so executed in *Creecy's* absence, if there were evidence to show, that it was delivered to, or taken by any of the creditors, or by any body for *Mr. Moore*, upon the agreement that it was then *Creecy's* deed, though *Moore* had not sealed, and was to seal. But in the absence of such evidence, I must suppose, that *Creecy* kept the deed himself; because I cannot presume that he intended an absolute execution, until *Moore* should also execute it, and come under the obligation imposed by the covenants on his part. Those relate to the application of the proceeds of the sales to the payment of the debts, and the surplus to *Creecy* himself. In the absence of all proof as to the custody of the deed from the time that *Creecy* signed it, until it was produced in court with *Moore's* signature, and that of a second witness, the presumption is, that *Creecy* himself held it. And this is fortified by the failure of the plaintiff to call the second witness, who probably attested the execution by *Moore*, and could have stated the time, and also the person who produced the deed. But as the case is to go back to a new trial, I do not deem it material farther to discuss this point.

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But I cannot yield my assent to the proposition, that there has been a due registration of this deed. For the want of it, I think it is void as against the defendant, by the express words of the act of 1820. It is said, however, upon the authority of *Ridley* v. *McGehee*, (*ante* 2 *vol.* 40.) that what ought to have been done by a public officer, should be considered as done; and that as the party had done his duty, he shall have the benefit of that, notwithstanding the officer of the law omitted his. I cannot perceive the force of this reasoning, when applied to this case. I admit, that if one covenant with me to do a particular act, and I discharge him from it, or hinder the performance, it is to be taken as performed. But there is no instance of this being extended to third persons. In relation to them, an act required by the law, or by contract, must be strictly performed. If one contract to convey me an estate, if *A* go to Rome by a particular day, and he prevents *A* from going, he shall convey; for he was the cause why the condition was not performed. But if *A* die, I cannot claim the estate, although my claim has been defeated by the act of God; because the stipulation was for an act to be done; and he, in whose favor that stipulation is, did not prevent it. Still less can duties of public officers be thus dispensed with. An expression of Chief-Justice MARSHALL, in the case of *Marbury* v. *Madison*, (1 *Cranch*. 161) has been relied on to the contrary. But I think that a perversion of the meaning of the judge. That case was a motion for a *mandamus* to the defendant as Secretary of State, to compel him to deliver to the plaintiff a commission, as justice of the peace for the District of Columbia, which had been made out and signed by the late President ADAMS, and left by the defendant's predecessor in the office. Several objections were made; one, that the commission was a deed, and had never been delivered; another, that it was not complete, because it had not been enrolled. In answer to this last, the Chief-Justice says, it was the defendant's duty to enrol it, and therefore it will be taken as done. But how? Plainly, as against the defendant; not third persons. He means

Per RUFFIN, J. An act required by law is not considered as performed, altho' the performance was prevented by the act of God. Hence, where a deed was not duly registered by reason of the death of the register, it passed no title to the vendee.

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nothing more than this; that the defendant could not justify the non-performance of one duty by alleging the omission of another. But he does not determine, that *Marbury* was a justice of the peace—*had a title* by virtue of a commission not enrolled and not delivered, because the defendant ought to have performed those completing ceremonies. If that had been the decision, it would have been in point here; but I apprehend, that no person can suppose that such a decision ever would have been made. If that had been the opinion of the court, it would have saved all the painful argument in the case, and the extrajudicial reasoning of the judge, because the *mandamus* was altogether unnecessary, since the plaintiff already held the office, without the possession of the commission.

Nor can I imagine any other case, where an officer omits a duty, in which the party entitled to have that duty performed has a right to consider it as performed, as against another person. If I deliver an execution to a sheriff, and a second person does the same, but mine has the legal preference, and yet the sheriff pay the money to the other; I cannot sue the party for the money, but must take my redress against the officer. But it is said, let the person who is injured by the want of registration sue the register; the law will not visit his neglect upon him who has actively done all he could do. I agree, that the party injured ought to sue, and that such suit is deemed in law a competent redress. But who is that person? Surely he who claims under the deed, and not he who claims against it. If it is to be considered as registered, then a third person cannot possibly be injured by not registering it, nor can he to whom it is made: because he loses nothing by the want of registry. Then here is the case of an officer, omitting a positive duty expressly enjoined by statute, and he is responsible to no one. The decision seems to me to be a repeal of the registry acts; and to encourage officers in their negligence. The only safeguard, in my opinion, is to give the party who has the immediate and direct interest in the performance of the required act his remedy by action

for the non-performance. And this is particularly true in regard to the registry acts. For how can the creditor show an injury? The law for his benefit requires the deed to be enrolled, that he may know the contents of it, and the extent of his debtor's means. If the register omit to do it, and the deed be lost by that cause, the party claiming under it is injured. But he who claims against it, as creditor of the maker, cannot be. He loses nothing by the want of registration. For if the omitted act had been performed, it would only have made the deed, by the express terms of the law, effectual against the creditor's rights by execution. But suppose a purchaser to be concerned instead of a creditor. The unregistered deed, even with notice, is not valid at law. It does not pass the title, but raises a trust in equity. All the questions upon the effect of notice are in equity; except in Massachusetts, where there is no such court. And the relief in equity is not upon the footing of a construction of the statute, but upon that of fraud *dehors*, by reason of the notice. (*Le Neve* v. *Le Neve*, 3 *Atk.* 646.) And *there is no case* even in that court, in which the deed has been set up against a creditor or purchaser, upon the score of accident or the act of God. Indeed the unregistered deed is not made good at law, but the subsequent purchaser with notice is decreed to convey. The first purchaser makes out his title at law, under the conveyance from the last purchaser. For a deed of bargain and sale must be pleaded at law as "*a deed enrolled within six months*, according to the form of the statute." (1 *Saund. Rep.* 251, *note.*) Where the parties are equally innocent, the loss must rest where chance or Providence places it. Purchasing with notice—fraud—is the *only* ground of relief. This has been decided in a most remarkable case in New-York, after long consideration, and by the unanimous opinion of the judges. In *Frost* v. *Beekman*, (*Johns. C. R.* 288) a mortgage for $3,300 was delivered into the registry office for enrolment, and was enrolled; but *by mistake* was enrolled as a mortgage for $300 only. The mortgagee did not think of setting this up at law for any purpose. But he filed his bill in

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equity, to have it declared there a good mortgage for $3,300. He did not even claim this, as against a third person, upon the score of accident; but upon that of notice, upon the principle, that he who knows of the existence of a document, must take care to inform himself truly of all its contents. The chancellor, *Kent*, held that registry was required to enable the incumbrancer to give notice to all the world of the extent of his incumbrance, and that registry was such notice; but that the registry was not notice of any thing but what is therein seen, although the officer, and not the party, is the person to compare the instrument with the registry. The deed was declared to be a mortgage for $800 only. *Beekman* v. *Frost* (18 *Johns. Rep.* 544) is the same case on appeal, in the Court of Errors; and the chancellor's decree on this point is affirmed without a dissenting voice. No case can be more direct or stronger—that even in equity, the case at bar could not stand. For, (if there was any equity against a creditor,) the lien of *Collins'* execution is anterior to any notice of the deed. But let us carry this a little farther, and suppose the deed not registered even at the trial. Could it then be read in evidence, upon the ground that there was no register, or that the register had neglected or even refused to register it? The statute says positively, it shall not; and I think we cannot say, it shall. Besides, it opens the door to most extensive and innumerable frauds. A party has nothing to do, but combine with the register, and get the latter to refuse to put the deed upon record, and he may safely keep it concealed in his own pocket ever after. For if a creditor, who is defeated by it, sues the register, the latter asks him, how are you hurt by my refusal? For if I had registered the deed, you could not have reached the estate, and you are no worse off now. Upon every principle then, and upon authority, I dissent from the reasoning in *Ridley* v. *McGehee*. But even if that case be right, it is not an authority here; because the deed was there in the custody of the officers of the law for the whole time. Here the party took the deed from the clerk, who was bound by the acts of 1807 and 1814 to deliver it to

The case of *Ridley* v *McGehee* (*ante* 2 *vol.* 40) doubted by Ruffin, J.

the register within ten days; in which case it might have been enrolled before the register's death. I admit, the party is not obliged to leave the deed with the clerk; but if he do not, he deals with it himself, I think, at his peril.

Upon this ground therefore, I am of opinion, that it was shown the plaintiffs had no title, and that the judgment ought to be affirmed.

Per Curiam.—Judgment reversed.

Asa Leadman v. John W. Harris & William Jackson.

A deed made for the purpose of indemnifying a surety against a responsibility, created as a pretence for making the deed, and thereby to secure the use of the property to the debtor, is fraudulent.

This was an action of trespass, for seizing and taking away sundry articles of personal property, tried before his Honor Judge Norwood, at Guilford, on the last circuit. The defendant pleaded *not guilty* and a special justification under process against one *Kirkman*, and on the trial the case was, that *Levin Kirkman, jun.* was indebted to *John Kirkman* and *James Hendricks*, in the sum of $600; and in part satisfaction thereof, conveyed to them his land at the price of $ 550. For the purpose of securing the balance of $50, and as an indemnity to them against the payment of a bond for $200, given by him and those two persons as his sureties to *Levin Kirkman, sen.* he executed to the plaintiff a deed of trust for all the residue of his worldly substance, including a great variety of articles, and of much greater value than $ 50. The deed bore date the 9th of June, 1829. *Levin, jun.* was much indebted at the time; and amongst his debts was one to *Harris*, the defendant, on a bond for $75, on which a warrant issued on the 11th of June, 1829, and judgment was given the next day, and execution issued, under which the property sued for in this action was sold. The plaintiff claimed it under the deed

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of trust; and the defendant insisted, that the deed was fraudulent.

Evidence was given, that the debtor said, he would never pay the debt to *Harris*, if he could help it; and that he was the brother of *John Kirkman*, and son of *Levin Kirkman, sen.* Evidence was also given by the father, that his son *Levin* truly owed him $ 300 and upwards; and that in May, 1829, he applied to him to secure the debt by a deed of trust for his land; which the son refused to give, unless the father would take one to cover all his property, which he said, would enable him to save some of it. The bond for $ 200 was given at the time the deed was executed. It was executed at the house of *Levin, jun.* and without the knowledge of the father, to whom the son refused to deliver it on that day, but did deliver it the next. Afterwards, *John Kirkman* paid the bond.

The case stated, that the judge explained the law of frauds against creditors to the jury; and instructed them that if the deed were not fraudulent, it would be good in law, although the bond was executed without the knowledge of *Levin*, the father, and was not delivered until the next day; for that the other considerations were sufficient to support it; and as the bond was beneficial to the father, his acceptance was to be presumed; and when made, related to the execution of the bond, provided the bond was made with the intention, in good faith, to deliver it.

A verdict was returned for the plaintiff and the defendants appealed.

Winston, for the defendants.

No counsel appeared for the plaintiff.

Ruffin, Judge.—I do not question the proposition laid down, that a debtor may, in the absence of his creditor, execute a bond in his favor, or a deed by way of a security for a debt due by bond or otherwise, and that such bond or deed, if made with an honest purpose, will be effectual when assented to by the creditor, and that such an assent is to be presumed. Yet it is a suspicious

circumstance, that the deed should be made of all the property, on the debtor's own motion, without being at all sought by the creditor, to secure a particular debt. But I more than question, whether such an instrument, when kept by the party making it, and subsequently delivered, has relation for any purpose beyond the actual delivery. But I do not think it necessary to discuss that, because I conceive the deed to be plainly fraudulent, in a point of view not explained to the jury; for which I think there must be a new trial.

It seems, that a bond, which is retained by the obligee and subsequently delivered, does not relate beyond the actual delivery.

The whole controversy, as appears from the case, turns upon the question of fraud. Now I do not question the power, nor the sole power of the jury to find the intent, when it is to be made to appear by matter extrinsic of the deed. But what intent is in law fraudulent, the court must inform the jury, else the law can have no rule upon the doctrine of fraud; and every case must create its own law. I think here is a plain fraud. The deed was not made to secure a debt. I mean, that was not the design of it. The debt was created, that is, the responsibility for which the deed is declared to be an indemnity, for the sake of a pretence for making the deed, and thereby securing the use and possession of the property to the debtor.

Where the fraudulent intent is made to appear by evidence extrinsic of the deed, it is a question for the jury. But what is a fraudulent intent is a question of law.

There are various species and various evidences of fraud. A common instance is, where the debt is not a true one—of which the strongest evidence is the possession unreasonably remaining with the pretended debtor. Another instance is, where the debt is a true one, but the possession is left so as to give the debtor a delusive credit, and enable him to cheat honest men. And in every case, where it is made manifestly to appear, that notwithstanding the deed, the debtor is to have the real use, as it were, the beneficial ownership of the property, it is a presumption of law, to be delivered to the jury, that the deed is fraudulent. This is founded upon both the foregoing principles combined. It is on the one hand evidence, that the consideration is feigned; and on the other, that it was designed by both parties to hold out to the world a false appearance as to the circumstances of the

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debtor, and thus entrap subsequent creditors, as well as deceive prior ones. These inferences from possession are certainly open to explanation, and are to be drawn by the jury. But the tendency of the evidence and the grounds of the inferences are proper subjects for observation from the bench. There is however another principle equally important, which is also connected with this subject. The law intends, that no man shall contract a debt, *which he does not mean to pay*; and will not uphold any means taken to enable or encourage him to do so. If therefore, as is mentioned in *Twine's* case, a conveyance be taken for a true debt, upon the understanding that the debtor is to have the use of the property; that although it is apparently conveyed in satisfaction or security for it, yet the beneficial ownership is to be with the debtor, it is void. Why? Because it is taken, that in truth, it was not taken for the very purpose of satisfying the debt, but under the cover thereof, *for the ease and favor of the debtor*, either generally or for some definite time. What temptations would it not hold out to dishonest men to run up scores, without the smallest intention of making payment, if by finding a friend amongst their creditors, they could enjoy their property all their lives against the other creditors. It must be made men's *interest* not to be dishonest in *contracting* a debt, more than in putting away their property from all their creditors. And the only way to do that is by saying, that if it appear that the conveyance was truly made, not for the creditor's benefit, but for the debtor's, it is void. It is true, that where the debt is a just one, the covenous intent is difficult of proof, and can seldom be proved; because *prima facie* a just debt makes the deed *bona fide*. Nevertheless, where the intent can be reached, it is not the less fraudulent, indeed has more moral depravity, because it assumes a more specious appearance.

A deed made to secure a true debt, but for the real purpose of enabling the debtor to continue in the use & enjoyment of the property conveyed, is fraudulent and void.

This is a case, in which I think it is reached and plainly exhibited. The debtor wished expressly to evade the payment of *Harris'* debt. To effect it, he had endeavored to make a conveyance of *all* his property to his father, which the latter refused, though he wished a security upon

what he deemed enough. In the father's absence, and without his privity, he does not make a deed to secure the payment to his father, but gets two other men to join him in a bond to the father, and then conveys to indemnify them. Why should they volunteer this liability? They knew the debtor's insolvency, and had taken a deed for the land in part payment of their debt. Only the small balance of $50 remained due to them. Why did they not secure that on part of the property? Because it would not answer the purpose. The object was to cover *all*; and to enable them to do so with some color, they execute the bond, leave it with the debtor, and take a deed for every thing to pay the $ 50, and repay them what they should pay to the father. That the bond was made with this view is further to be inferred, because there had been no settlement with the father, and the debt was assumed at a venture for the occasion. Were this bond and deed made for the security of the creditor, (the father,) or were they executed for the different purpose of shielding the debtor from the assaults of other creditors, and retaining his effects, his household stuff and provisions on hand, and growing crops, to the use and ease of the debtor himself, or to use his own words, to *save* his property? All may judge, and few can be deceived I think. For the purposes of this life, the debtor is as well off as if the property were his own, and he owed not a cent, supposing the deed could be made with this intent, and could be supported; yet as to his creditors he is not worth a cent, and they are defied.

I do not say, that the court ought to have instructed the jury, that such conclusions of fact were drawn by the law. Far from it. But I think they ought to have been informed, that they might be made from the evidence, if believed; and submitting the case to them on that point, to have been told, that if they found the bond and deed were made with that intent, the latter was void. The instruction would then have been given on the *gist* of the controversy. As the case was not so presented to the jury, I think there ought to be a new trial, that it may be.

Per Curiam.—Judgment reversed.

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William Bender v. John Askew.

Where a judgment has been improperly entered up, the party suing out execution upon it, is a trespasser, if the court subsequently set aside the judgment and execution.

Trespass, for suing out an execution, and selling the property of the defendant, under process upon a judgment of the County Court which had been set aside.

Plea, *not guilty*, and a special justification under final process.

Upon the trial before his Honor Judge Strange, at Lenoir, on the last spring circuit, a verdict was entered for the plaintiff subject to the opinion of the court, upon the following case.

At the April sessions, 1827, of Lenoir County Court, a writ was returned at the instance of *John Tull* to the use of the defendant, *Askew*, against the plaintiff and two others. The return was, "executed on all but *Bender*." An appearance was entered, and pleas filed for those taken, and an *alias* ordered as to the plaintiff. At January term, 1828, a *nolle prosequi* was entered as to all but *Bender*, and a judgment final by default entered up against him—upon which a *fi. fa.* issued returnable to the ensuing April term; which was levied upon his property. And afterwards the same property was sold under a *venditioni exponas*, returnable to July term, 1829; at that time it was ordered. "that the judgment and execution against *Bender* be set "aside, it not appearing to the court that said *Bender* "had been served with process."

Upon these facts, his Honor set the verdict aside, and entered a nonsuit, from which the plaintiff appealed.

No counsel appeared for the plaintiff.

J. H. Bryan, for the defendant, cited *Knox* v. *Summers*, (3 *Cranch*. 499.) and *Polland* v. *Dwight*, (4 *Id.* 421.)

Ruffin, Judge.—There seems to be no doubt, that defects in judgments may be amended as to matters within the statutes, after they are rendered, and even after

writ of error brought, or appeal had. There seems to be as little doubt, that errors or defects in executions of a similar kind may be amended after they have been acted on, so as to make them correspond with the judgment. This is for the purpose of making the writ a good justification, where before it was not; although it thereby may bar an action of him, who has been imprisoned on it, or had his property sold under it, while in an imperfect state. Having this effect, the courts are always careful never to allow such amendments, but to answer the purposes of justice, and upon proper terms—as if the amendment be in the record after error brought, upon the payment of the costs of the writ of error, provided the plaintiff in error do not proceed further after the amendment. Instances of amending writs of execution for the purpose of supporting proceedings under them, are found in *Latroche* v. *Wasbrough*, (2 *T. R.* 737.) *Newman* v. *Law*, (5 *Id.* 577,) and *Mowys* v. *Leake*, (8 *Id.* 416, note *a.*)

Defects in judgments may be amended even after a writ of error; and executions may also be amended after they have been acted on, so as to render them a justification to the officer where otherwise they would not be.

Correlative to this power is that of setting aside all *irregular* process and proceedings. This has been often done with respect to all parts of the proceedings, from the leading to the final process—the court taking care to exercise the power upon proper cases, and when applied for in due time, and before the irregularity has been cured by other steps taken in the cause. Office judgments, by which I mean those signed by the plaintiff in the course of the court, without any actual adjudication by the court, must necessarily be held to be under the future control of the court, when any thing improper is made to appear in them. As to them, the authority of the court is not restricted to the term in which they are rendered; for if it were, it would amount to nothing, since neither the court nor the defendant knows of them at that time. Strong examples of this sort are judgments taken for usurious debts upon warrants of attorney. And many other instances are given in *Tidd's Practice* 614, of judgments by default being set aside for irregularity; and among them, signing such a judgment before the appearance of the defendant, and before regular service of the process. Courts then have

Judgments by default, signed by the attorney without an actual adjudication by the court may be set aside at any time, even after the term at which they are entered.

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this power. Indeed it seems indispensable to the administration of justice, and the due regulation of the officers of the court.

But it is said here, that the defendant appeared, and appearance dispenses with a writ; and much more with the service of it. True, such is the effect of appearance; and if a court of error were passing upon the record of the suit in the County Court, in its original state, the judgment could not be reversed, because the defendant *Bender* did not appear to be in court. But that is not the question here. It is, whether *that* court is precluded from inquiry into the fact, whether he did appear or not, for the purpose of determining, whether or not the office judgment signed against him was regular. And upon that question there can be no doubt, as long as it is conceded, that a judgment may be set aside for irregularity; for that necessarily implies the capacity to ascertain, whether in fact the irregularity was committed.

It would seem from an inspection of the record of the County Court, that there was no appearance by *Bender*; for at the very term, at which the attorney enters his appearance for the defendants, an *alias capias* is awarded against *Bender*, which shows that the appearance was for the other two.

After a judgment by default has been set aside, another court cannot inquire collaterally, whether it was set aside properly or not.

But this court does not enter into that. This is not an appeal from the order setting aside the judgment. In this collateral way, the propriety of that order cannot be examined, unless it be absolutely void. It is not void; for in proper cases, all courts can and ought to exercise that jurisdiction; and when they have done so, another court cannot, collaterally, disregard the act, unless the power be denied in all cases. Here, therefore, we do not inquire, whether the County Court exercised its discretion properly in this particular case, but whether that court possesses the power in any instance. If it does, then this must be taken to be proper, while it stands.

What is the effect upon the present action, of the order of the County Court? Very clearly it is, to prevent the defendant from justifying under the judgment and execution. (*Philips* v. *Biron*, 1 *Strange* 509. *King* v.

Harrison, 15 *East.* 615.) It is the same thing, as if they never had existed. It is true, that it is now usual for the Court of King's Bench to restrain the defendant from bringing an action of trespass, unless a strong case for damages be shown. (*Tidd's Pr.* 1072.) But this is discretionary, and without an order, there is no bar; for the writ is put out of the way. It forms, indeed, a justification for the sheriff, if it be not void upon its face; because he is no wise responsible for irregularity in the proceedings, unless he joins in the plea of the party. It is now usual upon setting aside proceedings for irregularity, to make an order of immediate restitution, instead of putting the injured party to his action, and to enforce such order by attachment. But the party has his action, unless restrained, and that was formerly the only method of redress. (*Barker* v. *Norwood et al.* 3 *Wils.* 368.) Here the order did not extend to that subject.

PER CURIAM.—JUDGMENT REVERSED.

WILLIE McPHERSON, *et al.* v. JOSEPH SEGUINE.

Tenants in common cannot maintain trespass against each other; even after they have made a partition by parol.

TRESPASS QUARE CLAUSUM FREGIT, originally commenced by the plaintiff, *McPherson*, and one *Samuel Proctor*; but upon the death of the latter, revived by his heirs at law.

Upon *liberum tenementum* pleaded by the defendant, the cause was tried at Gates, on the last circuit, before his Honor Judge MARTIN, when the plaintiffs produced

1st. A grant to one *John Fontaine*, for 6000 acres of land.

2d. A deed from one *Morris* to the plaintiff, *McPherson*, dated in 1818, calling for 1500 acres, a part of a tract of 6000 acres, granted to *Fontaine*, lying in the Dismal Swamp, but without stating any beginning, or any particular lines.

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3d. A deed from *McPherson* to *Sawyer* and *Proctor*: and they proved that *Sawyer* died, leaving an only daughter, who married *Proctor* and had issue.

The defendant claimed an undivided part of the 6000 acres granted to *John Fontaine*, and deduced his title as follows:

1st. By proving *Fontaine's* death, and the descent to his sons, *William*, *John* and *Patrick*.

2d. A deed from *Patrick* to *John Cowper*, for 1500 acres of the 6000 acre tract.

3d. A partition of *John Cowper's* estate among his children, and an assignment thereby of the 1500 acres of the original grant to *Fontaine*, to *Willis Cowper*, one of the sons of *John Cowper*.

4th. A deed from *Willis Cowper* to the defendant for 1580 acres of land, "part of a large tract granted to *John Fontaine*, being the part allotted, laid off and divided to *Patrick Fontaine* and *Charles Fontaine*, heirs of *John Fontaine* deceased, by the County Court of Gates, at August term, 1803, and being the lands purchased by *John Cowper* from said *Patrick* and *Charles*."

The plaintiff then proved a partition by parol made between the parties to this suit in 1819, before its commencement.

Upon the case thus appearing, his Honor nonsuited the plaintiff, who appealed.

Kinney, for the plaintiff.

Iredell, for the defendant.

RUFFIN, Judge.—The deed, under which the plaintiffs claim, conveys only an undivided share of the 6000 acres patented by *Fontaine*. The defendant's is also an undivided interest in that tract. The deed to him does not in itself describe any boundaries. It says, it is true, that the land thereby conveyed is part of a large tract, patented by a certain *John Fontaine*, and contains fifteen hundred and eighty acres, "being the part allotted, laid off and divided to *Patrick Fontaine* and *Charles Fontaine*, heirs of *John Fontaine*, deceased, by the County Court of Gates at August term, 1803, and being the land purcha-

sed by *John Cowper* from said *Patrick* and *Charles*." But no such partition is produced, as that referred to in the deed; nor is the deed to *John Cowper* produced. So that it is impossible to say, that the deed covers any particular part of the 6000 acres, but only the shares of *Patrick* and *Charles Fontaine*, whatever they may be.

The case states further, that upon the death of *John Cowper*, his estate was divided amongst his heirs at law, and the interest in the *Fontaine* patent was thereby assigned to *Willis Cowper*, the vendor of the defendant. But that does not carry us a step further towards the several titles or possessions of the parties to this suit; because it does not seem, that there was any partition between the *Cowpers*, and the other claimants of the *Fontaine* patent, or that any particular specified portion of that was allotted to the *Cowpers*, or to *Willis Cowper*. It only amounts to this: that the interest of *John Cowper* in that patent, whatever it might be, whether in common or in severalty, should be taken as the share of *Willis* of the estate of *John*.

The parties then are tenants in common, and one cannot maintain trespass against the other. The attempt to make a partition *in pais* in 1819, was nugatory. (*Anders* v. *Anders*, 2d *vol.* 529.)

The case of *Anders* v. *Anders*, (*ante* 2 *vol.* 529) approved.

Besides, there are other objections which it would be difficult for the plaintiffs to get over. Among them I may mention, that upon the death of *Proctor*, one of the original plaintiffs, his *heirs* are made parties to revive instead of his executor.

Upon the death of the plaintiff in *trespass quare clausum fregit*, the suit must be revived by his executor, & not by his heir.

PER CURIAM.—JUDGMENT AFFIRMED.

JOSIAH F. GRANBERRY & JOB PARKER v. JOSHUA A. POOL.

No matter can be pleaded in discharge of the liability of bail, except the death or surrender of the principal.

This was a SCIRE FACIAS against the defendant, as the bail of *Asa Rogerson*, to which sundry pleas were filed, but on the last circuit, at Pasquotank, the defendant with-

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drew all of them, and pleaded since the last continuance, "that a certain process, called a warrant of distress, "issued from the Treasury Department of the United "States, against the said *Asa Rogerson* in the said *scire* "*facias* mentioned, and that upon the said warrant the "said *Asa* was arrested at the instance of the United "States, and is now confined in jail upon said process "in the State of Tennessee, and therefore that the said "*Joshua A. Pool* cannot surrender his said principal in "discharge of himself, and this he is ready to verify, "wherefore, &c."

To this the plaintiffs demurred, and assigned for cause of demurrer, that the plea did not show in what jail the principal was confined.

His Honor Judge MARTIN sustained the demurrer, and rendered judgment for the plaintiffs, from which the defendant appealed.

Devereux, for the defendant.

Hogg, for the plaintiffs.

After the argument, *Devereux* for the defendant tendered a plea, averring that *Rogerson* was dead at the time the judgment was rendered in the court below.

RUFFIN, Judge.—The plea does not state for what matter or cause *Rogerson* is imprisoned, whether civil or criminal; and is for that reason alone defective. But supposing we must intend, that as it alleges the imprisonment to be on a warrant of distress issued from the Treasury Department of the United States, that he is confined for a *debt* due to the United States, the question is, does that bar this action against his bail. It is clear that it does not. The statute makes the death of the principal or the surrender of him, a bar; and nothing else. In England, if he be imprisoned within the realm, so that the bail cannot make a personal surrender, the court will have him brought up by *habeas corpus* for that purpose. Our statute of 1777, (*Rev. c*, 115, s. 22) directs in such case, that the court may, upon the motion of the plaintiff or bail, order such principal to be retained a prisoner until the plaintiff's debt be paid, and the service of the or-

der on the jailor shall authorize him to detain the debtor; and this shall be deemed a surrender of the principal and discharge of the bail. It does not provide for an imprisonment of the principal beyond the jurisdiction of the court. If indeed it be unlawful for the principal to remain or to come into the country, or if he be imprisoned abroad for a criminal matter, so that the bail cannot by any means take his body for the purpose of surrendering him, the court may in its discretion relieve the bail as far as justice demands; but even such facts cannot be pleaded in bar of the action against the bail. It would be manifestly wrong, that they should constitute a bar; for the bail may be indemnified to the full extent of his responsibility, or may have calluded with the debtor to get him off. Relief is therefore given in such cases, by staying the proceedings against the bail, or by entering an *exoneretur*; upon motions for which the parties may be put to their oaths, and the merits determined. But I do not find any case, where any relief has been given upon the mere ground, that the principal is imprisoned beyond the jurisdiction for a debt. Such an imprisonment must be taken to be temporary; which must make it fail as a bar; which is the point before us now. And I see no reason why such an imprisonment—for a debt—should induce the court to enter an *exoneretur*, or stop the proceedings. For the bail must be taken to have undertaken to produce his principal, unless it was unlawful or impossible. This is the case with an alien enemy, one transported for a crime, or imprisoned abroad for like matter. But he may always arrest his principal, who is imprisoned for debt only, by paying that debt. He has engaged to surrender him, without any such exception. The plaintiff must lose the benefit of his recovery, unless the bail be bound to release the debtor from his confinement abroad; for if the plaintiff were to do so, he could not arrest him and bring him within this jurisdiction. The bail alone has that power. But the clear reason is, that the bail contracts to have the debtor forthcoming; and it is no answer to that for him to say, my principal owes another man as well as you. He ought to have seen to that beforehand.

If it is unlawful for the principal to come into the state, or if he is imprisoned abroad for a criminal offence, the court will in its discretion relieve the bail.

But no relief will be given, where the bail is imprisoned abroad for debt.

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But it is not necessary to consider, whether such a state of facts warrants any relief, since the inquiry here is, whether it is a good *bar* to the action of the plaintiff. We all think for the reasons given—that the imprisonment is temporary, and that the bail may be no loser, because he may have the money of his principal—that the plea is bad, and does not bar the action.

A plea of the death of the principal cannot be received in this court, because it has no jury to ascertain its truth.

Since the case was argued, a plea has been tendered of the death of *Rogerson*, subsequent to the rendering the judgment in the Superior Court, supported by an affidavit of the defendant. It is too late. The plea cannot be received here; for there can be no pleading in this court. We cannot have a jury to try it. The final judgment was that of the Superior Court, which fixed the bail. Our province is only to say, whether that judgment was erroneous. If we thought it so and sent the case back, it would then be open to this defence. But as we see no error, it must abide the decision already made.

PER CURIAM.—JUDGMENT AFFIRMED.

DEN *ex dem. of* EDWARD HARDY & THOMAS J. NEWBERN v. HENRY N. JASPER.

Where an original *fi. fa* issued to one county, and an *alias* issued to another, a sale by the defendant of his property situated in the latter county, made while the first writ was in the hands of the sheriff, is valid.

EJECTMENT, submitted at Franklin, on the last spring circuit, to his Honor Judge NORWOOD, on the following facts:

A judgment was obtained in Bertie County Court against one *William J. Newbern*, at August term 1828, upon which a *fi. fa.* was made out, tested of that term, but by an agreement between the parties, not delivered to the sheriff. An *alias* issued, tested of the November term following, which commenced on the second Monday, being the 10th day, directed to the sheriff of Frank-

lin, who returned *nulla bona*. A *pluries* issued, tested of February term 1829, also directed to the sheriff of Franklin, who levied the same on the premises mentioned in the declaration, and sold them to the lessors of the plaintiff, to whom he executed a deed. On the 8th day of November, 1828, *W. J. Newbern*, for a full consideration, and *bona fide*, conveyed the same land to the defendant.

Upon these facts, his Honor gave judgment for the defendant, and the plaintiff appealed.

Seawell, for the plaintiff.

Badger, for the defendant.

RUFFIN, Judge.—The court does not deem it necessary to consider the effect, as against a vendee in Bertie, of the writ which was made out, kept in the office and never issued; because supposing it to have been delivered to the Sheriff of Bertie, it is our opinion that it would not invalidate the title of the defendants to the land in Franklin.

No case has been cited at the bar, or found by the court, which extends the lien of any writ beyond the territorial limits in which it can be executed. It would seem, that in reason it cannot be carried beyond those bounds; but is restrained to them by its terms. It is argued, that it embraces all the property of the defendant, wheresoever situate, upon the ground that the party shall not defeat the judgment by any act of his. I conceive, that this is unduly enlarging the rule and the reason. It is not the judgment, but the execution to which the principle is applied. True it is, that as to lands in England, the judgment is that to which respect is had; and as that is equally operative in every part of the kingdom, an alienation of the land situate any where after judgment, is void as against the *elegit*. But in reference to the execution of a *fi. fa.* it binds in England from the delivery, and here from the *teste*; and any alienation is avoided, which would defeat the writ. As to chattels then, it is not the judgment, but the execution to which we have regard; and the party is not permitted to defeat *the process*. But how can this be predicated of an

In England, lands are bound by the *judgment* upon suing out an *elegit*; and therefore *all* the lands owned by the defendant at its rendition are liable for its satisfaction.

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act done in a place, in which the process does not operate? *That writ* can in nowise be said to be thereby eluded; and that writ alone can be looked to as affecting the property. The party is restrained by the writ from disposing of any thing, which by the same writ can be taken in satisfaction of the debt. This is carrying it far enough; for often executions by the fictitious relation to the *teste*, overreach honest and *bona fide* sales. We find the law upon that subject certain and settled; and therefore we cannot change it from any sense of the hardship. In England however, the mischief produced the provision in *stat.* 29 *Car.* 2, *c.* 3, in favor of purchasers, that no writ of *fieri facias* should bind the property of the goods of the party, but from the delivery to the sheriff. This goes far to show, what was considered in that country to be the law. What was the evil? That people bought goods and lost them by force of a writ afterwards sued, which, by a fiction of law, related to a day beyond the purchase. The remedy provided is, that no such fiction shall hereafter exist, but every man may conveniently know whether he is getting a good title by application to the sheriff, and ascertaining whether he has an execution in his hands against those goods. But this protection is manifestly but a mockery, if he must apply to every sheriff in England, to see whether a *fieri facias* has been lodged in his office. It must mean the sheriff of the county in which the goods are: for to him alone can application be made without an inconvenience, which would prevent the making of any; and the statute would in fact have no effectual operation. Now this act of Parliament relates only to the time from which the writ shall bind, and is altogether silent as to the places in which it shall have force. This last is at common law. But I think the very object of the statute would be defeated as to the time, if the place be any other than the one county or bailiwick mentioned in the writ. And therefore, I take the law to be there understood, as confining the efficacy of the writ to the territory mentioned in it, within which it is to be executed. It is the more necessary that it should be so held here, since we have no *market overt*, by sales

in which, in England, the goods may be passed even against an execution in that county. The fraudulent contrivances to evade executions by the removal or sale of property may be easily suppressed either by an *elegit*, or by suing writs of *fieri facias* to several counties at the same time. Since this can be done, it ought to be required, as affording to purchasers some opportunity of getting a knowledge of their vendor's power to sell.

I think therefore, the judgment must be affirmed. I shall of course be understood, when speaking of defeating the particular writ, as not meaning to impeach the efficacy of an *alias*, as such, directed to the sheriff who had the original *fieri facias*.

PER CURIAM.—JUDGMENT AFFIRMED.

But here lands are bound only by the *fi. fa.* from its *teste*, and sales made after that time of land situated where the writ does not run, are valid. *Per* RUFFIN, J. An *elegit* may be sued out in this state.

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The law of the country where a contract is made, is the rule by which its validity, its meaning and its consequences are to be determined.

But where a law of Virginia gives *bona fide* purchasers from a bailee, who has had possession more than five years, a good title against the bailor, unless the bailment be registered, if a purchase, pending a suit by the bailor against the bailee, would not be valid in Virginia, so neither would it be in this state, altho' the suit was pending in Virginia, and therefore was not notice to the vendee here.

DETINUE for a slave, tried before his Honor Judge MARTIN, at Mecklenburg, on the last spring circuit.

Upon *non detinet* pleaded, the case was, that the slave in dispute was the property of the plaintiff, a resident of Virginia; that the plaintiff in the year 1816 loaned the slave to one *Greers* his son-in-law, who continued in possession until the year 1824, when the plaintiff instituted a suit for the slave against *Greers*, and in November 1825, obtained a final judgment. Pending that suit, *Greers* brought the slave into this state, and sold it to the defendant, who had no notice of the suit in Virginia, nor of the claim of the plaintiff.

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The defendant offered a certified copy of an act of the Legislature of Virginia, entitled "an act to prevent frauds and perjuries," passed November 30th, 1785, the second section of which is as follows:

"Every gift, grant or conveyance of lands, tenements, hereditaments, goods or chattels, or of any rent, common or profit out of the same, by writing or otherwise, and every bond, suit, judgment or execution, had or made and contrived of fraud, malice, covin, collusion or guile, to the intent or purpose to delay, hinder or defraud creditors of their just and lawful actions, suits, debts, accounts, damages, penalties, or forfeitures, or to defraud or deceive those who shall purchase the same lands, tenements or hereditaments, or any rent, profit or commodity out of them, shall be from henceforth deemed and taken (only as against the person or persons, his, her or their heirs, successors, executors, administrators or assigns and every of them, whose debts, suits, demands, estates, interests, by such guileful and covinous devices and practices, as is aforesaid, shall or might be in any wise disturbed or hindered, delayed or defrauded,) to be clearly and utterly void, any pretence, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding. And moreover, if a conveyance be of goods and chattels, and be not, on consideration, deemed valuable in law, it shall be taken to be fraudulent within this act, unless the same be by will duly proved and recorded, or by deed in writing, acknowledged or proved, if the same deed include lands also, in such manner as conveyances of land are by law directed to be acknowledged or proved, or if it be of goods or chattels only, then acknowledged or proved by two witnesses in the General Court, or court of the county wherein one of the parties lives, within eight months after the execution thereof, or unless possession shall remain really and *bona fide* with the donee; and in like manner, where any loan of goods and chattels shall be pretended to have been made to any person with whom or those claiming under him, possession shall have remained by the space of five years without demand made, and pursued by due process of law on the part of the pretended lender, or where any reservation or limitation shall be pretended to have been made of a use or property, by way of a condition, reversion, remainder or otherwise, in goods and chattels, the possession whereof shall have remained in another as aforesaid, the same shall be taken, as to the creditors or purchasers of the persons aforesaid, so remaining in possession, to be fraudulent within this act, and that the absolute property is with the possession, unless such loan, reservation or limitation of use or property were declared by will, or by deed in writing, proved and recorded as aforesaid."

His Honor charged the jury, that if the defendant had purchased after the rendition of the judgment in Virginia, it would have altered the relation between him and the plaintiff; but that having purchased before that judgment, a different right had accrued to him under the laws of

Virginia. That the question as to him was, whether his purchase was *bona fide*; that if he had notice of the pendency of that suit, his purchase was not *bona fide*; that a suit pending in another state was not of itself notice to a purchaser in this: that as the loan was made in Virginia, this suit arose out of that contract, and was to be determined by the laws of Virginia; and that by the law of 1785, if there was a loan by the plaintiff to *Greers*, and possession held under that loan for more than five years, without the registration of any instrument showing the terms of the bailment, the defendant was entitled to a verdict, provided he was a fair purchaser.

The jury returned a verdict for the defendant, and the plaintiff appealed.

Iredell, for the plaintiff.

Devereux, *contra*.

RUFFIN, Judge.—There cannot be a difference of opinion upon some of the general principles involved in this case. Such as these: that the law of the country where the contract is made is the rule by which the validity of it, its exposition and consequences are to be determined: and that where property in a particular country becomes, by the law of that country, rightfully vested absolutely in the possessor, as against another also in that country, his right is recognized, for his own benefit and that of his assignees, all over the world. The difficulty here is, to determine whether the right of property was determined in Virginia by the law of that state; and whether if it were not, the law can follow the thing here for any purposes. In the Superior Court it was admitted, that a purchaser *pendente lite* in Virginia would not have a good title; but it was supposed, that a purchaser here was not affected by that suit, because it was in another state, and he was not bound to take notice of it. And therefore it was held, that the statute of 1785 gave a good title to the defendant, as a purchaser here from the bailee, who, as to the defendant, continued to be a bailee, notwithstanding the action against him.

I cannot agree in this reasoning, because it is a contradiction in terms to say, that a purchase out of Virgin-

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ia gives, by force of the law of Virginia, a good title, when by the same law, a purchase in that state would confer no property.

It might well be doubted, whether the statute of our sister state follows the chattel here at all; unless the whole title be consummated according to it in that state. In other words, whether a purchasor, to be within the act, must not be a purchaser in that state. His title is then consummated under the law, where that law operates, and is therefore sustained, wherever that title is discussed. But it is not so easy to see, how one can by virtue of a law of a particular place, *acquire* a title at another place, where that law has no obligation, as to the requisites and effects of a contract made at this latter place. If in this case therefore, I understood the statute of Virginia in the way it is put in one part of the argument for the defendant, as not conferring on him the title, but only the power of conveying a good title to another, I should not hesitate to say that every thing must be transacted there, so as to complete the title in that state: for we can only take notice of laws conferring rights there; and not those giving a power there, to be exercised elsewhere. The law of the place where the power is exercised, determines the extent and the validity of the title obtained under it. But I do not think *that* the fair meaning of this statute. In putting a construction upon the statute of a sister state, this court would certainly adopt that of her own tribunals, if known to us. But none such have been furnished to us, and we are therefore obliged to understand the statute in the sense which its words convey to us. It is in this part of it a remedial statute against fraudulent conveyances; and as against creditors and purchasers from the possessor of a chattel for five years, a loan of such chattel, or reservation of a use therein shall be taken and deemed to be pretended and fraudulent, and the absolute property to be with such possessor, unless such loan or reservation of use be declared by will, or by deed proved and recorded. But the clause has this farther and important provision in it: that such possession for five years shall be with-

In construing the law of another state, the decisions of that state, if known, are to be followed.

out demand made and pursued by due process of law on the part of the lender. The enquiry is, what title the bailee gets by this law? It was obviously made for the protection of creditors and purchasers from the holder only, and it is to be taken, fair ones. It is observable and singular, that the same policy should in the two states have produced a legislation diametrically opposite. The policy is to suppress fraud. To effect it, our system as contained in the acts of 1784, 1806, and the proviso in 1820, is to avoid the gift to, and title of the bailee, in protection of the first donor or bailor, and *his* creditors and purchasers. Virginia avoids the rights of the donor and his creditors, in aid of the creditors and purchasers from the bailee; and for them turns an express loan into a valid gift. But the statute does not profess to interpose between the lender and borrower themselves. Possibly and probably such a possession may endue the latter with a *prima facie* right, and enable him to maintain *trover* or even *detinue* against a stranger. But as between the parties it remains a loan; and the law gives no rights to the borrower for his own benefit, but only for the benefit of his creditors, or purchasers from him. The bailor may at any time then, after the lapse of the five years, maintain his action against the bailee. For the possession is not to be deemed adverse, until there is a refusal by the bailee to redeliver, or until it be set up by a creditor or purchaser, as to whom the bailee is to be taken as having the absolute property. Then what creditor or purchaser is meant? Certainly not one within the five years, unless the two possessions united make that period. And as certainly, I think, not a purchaser, (however it may be as to a creditor,) who becomes so after the possessor ceases to be a bailee, and has become a trespasser within the act. It cannot be argued, that if the bailee at the distance of ten years return the chattel, he can afterwards sell it. Why? He ceases to be the possessor under the loan, and the purchaser cannot be imposed on. So if he be made a trespasser by a demand of the lender, followed up by a suit successfully prosecuted, he cannot after judgment make a good title.

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Why? For the same reason—because he does not rightfully hold under that loan, which is declared in the act to be fraudulent. Can he sell pending such a suit? It would seem strange if he could—for the demand and consequent action have precisely the same effect upon the the character of the possession, as the judgment therein rendered has. And there is this absurd consequence, to which such a position leads: the law allows the action to the lender against the borrower; but enables the latter to defeat it, by a sale posterior to the bringing of the suit. What is the value of such a right of action? There is no middle ground. Either the bailee has, by the five years possession without suit, an absolute title against the bailor, as well as the rest of the world; or he cannot, if I may use the expression, discontinue by alienation. And the former is not even contended; and from the result of the suit in Virginia, I presume cannot be. It is true, the common doctrine of *lis pendens* does not extend beyond the jurisdiction of the *forum*, and as such, does not affect this defendant, unless by force of the constitution of the United States, and act of Congress, giving to the judicial proceedings of one state full faith and credit in the others. I do not stop to investigate the operation of that principle, because I conceive the case does not depend on it. For the cause turns upon the enquiry, what purchaser is meant by him, *for whom* the possessor shall be said *to have the title?* Is he within the act, who becomes so after the borrower has ceased to have the possession, or has ceased to have the forbidden fiduciary possession? If he be, then neither a *lis pendens* nor a final judgment can annul the title acquired by him; because he holds above the plaintiff whose title is declared fraudulent and void, as to the purchaser protected by that act. But it has been shown, I think, that such a purchaser is not within the statute. This then is not upon the ground of a *lis pendens*, but upon the higher and more general one, extending to persons out of Virginia, as well as those in it; namely, that the nature of the possession is changed, and from a rightful one, has become wrongful towards the bailor; and therefore that the pos-

sessor is not such a possessor in whom the title shall be adjudged, for the benefit of one claiming by purchase from him. The defect of the defendant's title then does not consist in his having notice that his vendor was a trespasser, but in the fact that he was. He could convey no title here nor there, because in the state of facts existing, he had, by the law of Virginia, *no title* in that state. Upon a question of legal title, notice has no influence. The want of it cannot constitute that a right, which is not a right; nor can notice of a defective title in another make that better. Legal claims depend upon their intrinsic strength. And the rule is, *caveat emptor:* see that your vendor has good right; or in case he has not, secure yourself by covenants.

Upon questions of legal title notice has no influence; it does not affect a valid one, nor is a defective one aided by want of it.

I conclude therefore, that *Greers*, under the law of Virginia, had, at the time of the sale to the defendant, no title in himself for any purposes; and therefore, that the sale set up here passed none. Consequently there must be a new trial.

It will be seen, that the opinion of the court turns entirely upon the construction of the statute of Virginia, which we have reluctantly been compelled unaided to make. A second trial will enable the parties to correct a misconstruction by evidence, or cases showing the construction made in that state; which the court would feel every inclination, & acknowledge the obligation to follow. I entertain much diffidence in saying what is the meaning of that statute. But I cannot but have confidence in the opinion. that if the title of a purchaser in Virginia is bad, that of one here is not good.

PER CURIAM.—JUDGMENT REVERSED.

PHILIP BRITTAIN v. JAMES ALLEN.

Words which in themselves do not import a slanderous meaning, must in declaring on them as slanderous, be rendered so by an *innuendo*, connected with an averment that they were spoken of the plaintiff. But if the words are in themselves slanderous, it is only necessary to aver, that they were spoken of the plaintiff.

After the new trial granted in this case, (*ante* 2d *vol.* 120) it was tried again at Buncombe, on the fall circuit of 1830,

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before his Honor Judge Mangum. The declaration was as follows: *Philip Brittain* complains of *James Allen* in custody &c. For that whereas the said *Philip* now is a just &c. and whereas the said *Philip* hath not been guilty, nor until the committing of the several grievances by the said *James &c.* suspected to have been guilty of the infamous crime of feloniously passing counterfeit money &c. by means of which said premises the said *Philip* before &c. had deservedly obtained &c. yet the said defendant well knowing &c. and contriving and wickedly and maliciously intending to injure the said *Philip* in his good name &c. and also to cause him to be suspected &c. to be guilty of the felonious offence of passing counterfeit money, and that he had subjected himself &c. heretofore, to wit, &c. in the presence &c. falsely and maliciously spoke of and concerning the said *Philip* these false, scandalous, malicious and defamatory words, that is to say: "Our former senator" (meaning thereby the said *Philip*, he the said *Philip* having been a senator in the legislature of this state) "used vigilance and diligence in prosecuting *Welch* for passing counterfeit money," (meaning thereby one *William Welch* who was guilty of the crime of passing counterfeit money,) "in order to prevent suspicion from falling upon himself," (meaning thereby the the said *Philip.*) "He" (meaning the said *Philip*) "procured *Roadman*" (meaning one *William C. Roadman*, who prosecuted the aforesaid *William Welch* for passing counterfeit money) "to prosecute him" (meaning the aforesaid *William Welch*) "to extricate himself," (meaning the said *Philip*); and that "he" (meaning the said *Philip*) "was as deep in the mud, as *Welch*" (meaning the aforesaid *William Welch*) "was in the mire"; meaning and intending thereby, that the said *William Welch* was guilty of the scandalous and felonious crime of passing counterfeit money, and that the said *Philip* was also guilty of the said scandalous and felonious offence of passing counterfeit money; by means of the committing of which said several grievances by the said *James &c.*

Plea—*not guilty.*

After proof by the plaintiff of the defendant's speaking the words laid in the declaration, he offered proof of his

speaking other words of the same kind, both before and after the commencement of the action. The defendant objected to this testimony, but the objection was overruled by the judge.

A verdict was returned for the plaintiff, and the defendant appealed.

Gaston & Badger, for the defendant, upon the motion for a new trial objected, that words not declared on were admissible only to show, that those declared on were spoken with a malicious intent; and of course, that it was erroneous to receive them when it was not incumbent on the plaintiff to prove malice in the defendant; and they cited *Starkie on Slander* 397, 398. *Starkie on Evidence 4th part. page* 870. *Stuart* v. *Lovell* (3 *Eng. C. L.* 261).

They also moved in arrest of judgment, because the slanderous meaning of the words did not sufficiently appear, and because there was not a distinct averment that they were spoken of and concerning the plaintiff.

Iredell, contra.

HENDERSON, Chief-Justice.—We can scarcely conceive a case, which does not require some introductory matter, if for no other purpose than to show that the plaintiff is the person meant. As if the words are "you are a thief;" it must be stated, that the words were addressed to the plaintiff, to make an application of the word *you*. So if they be, "he is a thief;" that the plaintiff was the subject of the conversation; or "*A. B.* is a thief," that the plaintiff is the *A. B.* meant. Some words require more introductory matter than others. Where the words are perfectly harmless, as if in this case, the only words had been, "our former senator is as deep in the mud as *Welch* is in the mire," it must be stated, that the defendant imputed to *Welch* the crime of knowingly passing counterfeit money; also that the plaintiff had been a senator, with an averment, that he was the person meant, and an *innuendo*, that he meant to impute to the plaintiff the same crime. But the office of this introductory matter is only to fill up and supply what the words themselves *want* of being a

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slanderous charge on the plaintiff. In the present case, the words are, "our former senator used vigilance and diligence in prosecuting *Welch* for *passing* counterfeit money, in order to prevent suspicion from falling upon himself; he procured *Roadman* to prosecute him, to extricate himself;" and that he was "as deep in the mud as *Welch* was in the mire;" with an averment, that the plaintiff had been a senator, and was the person described and intended by that appellation; and that the defendant intended to impute to the plaintiff the crime of passing counterfeit money. The jury have affirmed all these averments to be true; and it is the province of the court to see, whether the jury have drawn a probable and rational conclusion. For the introductory matter and the *colloquium* are put upon the record for that purpose only, that the jury should not put an arbitrary and capricious construction on the words. And this introductory matter supplies, as was said before, what the words themselves want of imputing a slanderous meaning, with an *innuendo*, that they did mean a slanderous charge, stating it. If the case is tested by these rules, which are founded both in law and common sense, we think, that with the averment before mentioned, the jury were well warranted from the words themselves, in concurring with the plaintiff, that the defendant intended to impute to him the crime of passing counterfeit money. In fact, there needed no introductory matter but to show, that the plaintiff was meant by the description "our former senator," with an averment that he was the person meant. All the words taken together well warranted the *innuendo*. Candor requires us to say, that the declaration, when it was before us heretofore, was not supported on these grounds, but on other and perhaps mistaken ones. We are therefore of opinion, that the judgment should not be arrested.

In actions of slander, the *quantum* of malice is material in estimating the damages; and to establish that, e-

As to the motion for a new trial, we see no grounds to grant one. The defendant's argument, that the speaking of other malicious words is admissible only in cases, where the fact of malice is doubtful, and should not be admitted where the words themselves import malice,

or where malice is admitted, is predicated on the supposition that there are no degrees of malice; or if there are, that its quantum is immaterial; that in this action any malice, the least, fills the measure. We think the argument unsound, and that there are degrees of malice, and that in all vindictive actions, the degree of criminality of the defendant, as well as the injury sustained by the plaintiff, enter into and form a part of the damages. Our nature and feelings require it; and it will be the rule with jurors, even if in theory the law forbids it. But we do not believe it does. As to the court below informing the jury, for what purpose such evidence is given, and that the damages should be given only for the words sued for, aggravated to be sure by such other evidence of malignity as is before spoken of, we presume that the court did its duty; as upon the record it does not appear, that it did not.

evidence is admissible of words spoken by the defendant, not declared on; but the jury should be instructed as to the purpose for which the evidence is introduced.

PER CURIAM.—JUDGMENT AFFIRMED.

BENASHLEY ATKINSON v. JAMES S. CLARKE.

A deed of gift for slaves, which is not attested by a subscribing witness, is void.

The case of *Palmer* v. *Faucett* (*ante* 2d *vol.* 240) approved.

An assignment of slaves, not under seal, is void unless accompanied by a delivery of possession.

This was an action of TRESPASS, for taking from the possession of the plaintiff two negroes, *David* and *Charlotte*. Plea, *not guilty*, and a special justification under final process to the defendant, the sheriff of Pitt, against the property of one *Peyton R. Tunstal*. At the trial before NORWOOD, Judge, at Pitt, on the last spring circuit, the plaintiff produced a deed of gift dated the 18th of April 1822, whereby *Tunstal* in consideration of the love and affection which he bore to his daughter *Rebecca*, the wife of the plaintiff, conveyed to the latter the slaves in dispute. This deed was signed and sealed by *Tunstal*

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but was not attested by a witness, and was registered upon proof of the donor's handwriting; and the plaintiff proved a possession of the slaves conveyed by it up to the year 1827. The defendant gave in evidence the record of a suit against *Tunstal*, in Bertie County Court, in which judgment was entered up for the plaintiff at November term 1827, upon which a *fi. fa.* issued to the defendant, tested of that term, and a return made thereon of a levy upon the slaves in question. From August term 1828, a second *fi. fa.* issued, but it did not appear to have come to the hands of the defendant, or to have been taken from the clerk's office. From November term 1828, a *venditioni exponas* issued, reciting the levy made upon the first *fi. fa.* under which the negroes were sold by the defendant—who returned, that the sale amounting to more than the debt and costs, he had applied the residue to the satisfaction of another execution against *Tunstal*, from Halifax County Court.

The plaintiff then offered

1st. A deed from *Tunstal* to *Mark H. Pettaway*, dated February 22d 1826, conveying among other things "all "his, the said *Tunstal's*, negro slaves, say one hundred "and three in number, the names of said slaves being too "lengthy to insert in this indenture, said *Tunstal* will "give the name of each slave to said *Pettaway*, when "called for." To this deed was annexed a schedule stating that "the names of the negroes contained in the "within deed is as follows, viz." &c giving the names of a large number, and among them two by the names of *David* and *Charlotte*.

2d. An assignment and schedule, made and filed by *Tunstal*, upon taking the benefit of the act for the relief of insolvent debtors, whereby he conveyed all his property not before assigned to *Pettaway*, to the plaintiff. This was signed but not sealed by *Tunstal*. The defendant objected to this testimony, insisting that it did not affect him, and the objection was sustained by his Honor.

The judge instructed the jury, that neither the deed from *Tunstal* to the plaintiff, nor the possession under it gave the plaintiff title—that if the deed from *Tunstal* to

Pettaway was valid, it would pass the title of the slaves in dispute to the latter, and the plaintiff could in that event recover of the defendant, for the injury done to his possession of the slaves, if the *David* and *Charlotte* mentioned in the schedule were the slaves in question. His Honor left this question to the jury, who returned a verdict for the defendant, and the plaintiff appealed.

Gaston, for the plaintiff, objected that the second *fi. fa.* was a waiver of the levy made under the first, and that therefore the defendant had no power to sell; and cited *Amyett* v. *Backhouse*. (3 *Murph.* 63.)

Hogg & Badger, for the defendant.

RUFFIN, Judge.—The Superior Court does not seem to have erred upon any of the points made in that court.

The deed from *Tunstal* to the plaintiff is void. (*Palmer* v. *Faucett*, *ante* 2 *vol.* 240.)

The assignment by *Tunstal*, when he took the oath of insolvency, did not pass the slaves; for it was not by deed, and there was no delivery of possession nor price paid.

The jury have found, that these slaves were not included in the schedule annexed to the deed to *Pettaway* of the 22d of February, 1826, which is signed by both *Tunstal* and *Pettaway*, proved, and registered with the deed, and purports to set forth the "names of the negroes contained in the deed of trust."

It seems, that a *fi. fa.* not taken out of the office does not amount to a waiver of a previous levy.

But it is here contended, that the judgment must be reversed, because the *fi. fa.* from August term, 1828, discharged the seizure made in the preceding January; and consequently, that there was nothing upon which the *venditioni exponas*, under which the sale was made in January, 1829, could operate.

That *fi. fa.* does not appear ever to have been delivered to the sheriff, or taken out of the office. The cases have not yet gone the length, that the mere making out of a *fi. fa.* in the office, not acted upon, nor even issued, shall amount to a waiver or discharge of a previous lien. It would seem unreasonable, that it should. But however that may be, we all think the point made does not arise in this case.

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The objection was not made in the court below, but for the first time, here. It is not one arising out of the record itself; but out of the *ore tenus* incidents at the trial. I must repeat what was said on this subject in *Hemphill* v. *Hemphill*, (*ante* 2 *vol.* 391.) Such points of this kind, as were raised below, and those only, can be heard here. This is admitted to be so upon a bill of exceptions. But it is said, that our cases are the acts of the court, and contain the whole case.

An objection arising upon the statement of the *ore tenus* incidents at the trial, but not taken in the court below, will not be heard in this court.

There are, I grant, certain differences between a bill of exceptions and a case stated. The method of correcting the error pointed at in the former, is by writ of error; while, in virtue of our statute, those specified in the latter are reviewed upon appeal. Each bill of exceptions is confined to a single point; whereas by our practice, many and distinct questions may be stated together. And it may be, that there is this further difference: that to a limited extent, our cases may be regarded as reports on rules for a new trial. I suppose they are so, thus far and no farther: that if the cause come here after a motion for a new trial has been overruled, and the case made out appear to contain the whole case made at the trial, and from that it is clear, that at all events the verdict *must* have been the same way, notwithsthanding some wrong ground taken by the court, it will not be disturbed. This court is to give such judgment as the court below ought to give; and if, upon the whole case, the appellant was not entitled to a verdict, nor to a new trial at the hands of the Superior Court, no more ought he get it here. If he could, it would involve the anomaly, that the Superior Court was legally bound to give a judgment, which this court is legally bound to reverse. An example of this rule is found in *Grice* v. *Ricks*. (*ante* 62) It was thought here, that the instructions actually given by the judge were erroneous. But the case likewise stated, that another point was made at the trial for the defendant, on which the judge gave no opinion; and the whole case was set out, including the facts relevant as well to the one point as to the other. The jury found for the defendant, and the plaintiff moved for a new trial and

Cases stated upon an appeal to this court are similar to reports upon motions for a new trial, in one respect, namely, that if upon the whole case it is apparent the verdict is correct, the judgment will not be reversed, altho' there may be error in the point complained of. In other respects they are similar to bills of exceptions.

appealed. Had the cause rested on the opinion given, this court must have reversed the judgment. But it appeared from the facts stated, that whether the ground taken by the judge was right or wrong, the verdict was right upon the other point—not, that the jury might have found for the defendant on that point, but that they were obliged so to find; because from a defect of proof, the plaintiff had not made a case for a verdict under any circumstances, however the law might be upon the facts which he actually proved. If indeed wrong instructions be given, and it do not appear that they were necessarily harmless, a new trial must follow; because the revising court cannot know, that the jury would or ought to have given the same verdict, had the directions been different. Of the application of this principle, the case of *Tate* v. *Southard* (1 *Hawks* 45) is an instance, besides many others. But that is entirely opposed to a case, where obviously the jury ought at any rate to give the very verdict they have given, although different instructions had been delivered from the bench. It is a fair presumption, that the jury gave a proper verdict upon proper grounds. But were that presumption erroneous, there is yet no reason for disturbing a proper verdict—*which appears upon the whole case to be proper*—because it was rendered upon a bad reason. This comes up to the observation of Lord Mansfield, in *Symmers* v. *Regem* (*Cowper* 502). Indeed, I suppose that were this a writ of error upon a technical bill of exceptions, and it appeared in the exception itself, that the *appellant* had *no right*, the court would affirm the judgment, though some error might have been committed, for which a reversal would have been awarded, had nothing else appeared. Much more may, and will such be the rule in our appeals, in which the case is argued as upon a motion for a new trial in the court below. Thus far, I think, our cases may be considered as reports on rules for a new trial: that the appellee may insist, that the verdict ought to stand, notwithstanding the error complained of, because, upon the whole, it was right, and does the appellant no injustice; and to that end, the appellee may ask other

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points made by him, besides that on which the error is alleged by the appellant, to be stated in the case, accompanied by the facts, on which they were raised. But in no case, as I conceive, ought points to be heard here, at the instance of either party, which were not by him made below. For it is not true, that our *cases* are intended, or have been considered as *generally* setting out the *whole case*. They are not like a special verdict, or a case agreed; in the former of which, *all* the facts are found, and in the latter *all* admitted. Under the former organization of this court, only particular points of law came here. They might be stated as abstract questions. The duty, as now enjoined, of giving judgment upon the whole record, does not impose the necessity of reversing every judgment, to which is not appended a *case* proving it to be right. The case is in the pleadings and the verdict, *prima facie*. The sufficiency of the facts to support the verdict is presumed, until the contrary appear. And so of the law: proper instructions and right opinions must be taken as having been given, unless the party specially object to some one given, or the judge refuse to give some one prayed; which must be set down—whether by the counsel or the judge is immaterial, provided it be verified by insertion in the record, accompanied by a statement of such facts, as raised the point, to which the exception relates. Those facts, and those alone ought to be inserted at the instance of the party appealing, who must be confined here to his exceptions. Were it otherwise, no party could ever hope to have a judgment affirmed, unless all the proof given in the cause and the whole charge of the court be spread on the record—a task, the labor and difficulty of which would be intolerable to the judge and bar, and an obstruction to the progress of business, amounting almost to a denial of justice. No facts are necessary, but those which are material to a question made in the course of the trial, or upon the judge's charge. If facts, irrelevant to those points, be inserted, they cannot be attended to here. They cannot be used for any purpose, but that for which they were stated, namely, the point appearing to have been made. This

court cannot tell, what other facts might have been proved, which would repel their force as applicable to a point made here for the first time. As regards the appellant, at least, the whole case is not opened anew, upon the appeal to this court; but in general, our *cases* for appeals must be regarded as of the nature of bills of exceptions for specified errors.

This reasoning will of course be correctly confined to the *ore tenus* proceedings of the trial. All those arising upon the pleadings, verdict and judgment—upon the record rightly speaking—may be taken anew here; for but one language and one meaning can be found in them by all courts.

In the case now before us, the question on the discharge or the continuing of the lien, created by the seizure in January, 1828, was not made in the Superior Court. None of the facts stated can therefore be taken as stated in reference to that question. When they are pressed here, for the first time, must we not ask ourselves, whether we can be sure, that those were all the facts which appeared, touching the point now made? It may have been proved, that the *fieri facias* from August, 1828, was made out by the clerk without the authority of the creditor, and that he never took it out of the office: or, that having at first ordered it, he countermanded it, and never delivered it to the sheriff, nor sued it out: or the execution to Halifax mentioned in the return to the *venditioni exponas*, (to which a part of the money, raised by the sale, was applied,) may have been given in evidence, and been a sufficient authority to the sheriff. The questions made were not upon the authority of the sheriff to sell *Tunstal's* property. The whole dispute was, whether the slaves were *Tunstal's* at all; so as to be liable to *any* execution that could issue on the judgment in Bertie. The plaintiff cannot here, upon the facts stated to raise that question, allege that the judgment is erroneous, because those facts do not prove the judgment right upon the other point also; or indeed, upon any other possible objection, that might be ingeniously started. If any particular matter be not excepted to, it must be taken,

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either that it was waived by the appellant, or that it was in the court below otherwise well and sufficiently answered or avoided. Any other rule would convert this court from one of revision to one of reversal *ex necessitate*. I am persuaded, it was created for a very different purpose. Our duty is to set aside verdicts, when they have been, or may have been the consequences of errors actually committed by the judge. But it is equally our duty to suppose, that verdicts do right between the parties, (which presumption is much fortified when they are satisfactory to the judge who tried the cause, and who refused a new trial,) and to give judgment in accordance with them, unless they appear to be founded in error in law—which it lies on him who impeaches them to show.

PER CURIAM.—JUDGMENT AFFIRMED.

ROBERT GODLEY *v.* SAMUEL TAYLOR & FREDERICK HADDOCK, *Ex'r. of* WILLIAM HADDOCK.

Executors having a power to sell lands of their testator are personally bound by a covenant, that they "executors, &c. do forever warrant and defend, &c."

Where an action was brought upon a covenant of quiet enjoyment, made by a decedent, and the eviction took place more than seven years after his death, it was held, RUFFIN, Judge, *dissentiente*, that the action was not barred by the act of 1715, (*Rev. c.* 10, *s.* 7,) requiring claims to be preferred within seven years after the death of a decedent.

This was an action for the breach of a covenant of quiet enjoyment, tried before his Honor Judge NORWOOD, at Pitt, on the last spring circuit. The question made in the cause arose upon the pleas of the general issue, pleaded by both defendants, and the act of 1715, (*Rev. ch.* 10, *sec.* 7,) "concerning proving wills and granting "letters of administration, and to prevent fraud in the "management of intestates' estates," pleaded by the defendant *Haddock*, and upon these pleas a verdict was taken subject to the opinion of the court, upon the following case:—*James Taylor* by his will appointed the defendant *Taylor*, and the testator of the defendant *Had-*

dock, executors, and authorized them to sell his land. They conveyed the land to the plaintiff by deed, in which they were stated to be "executors of *James Taylor*," and in which they "executors to *James Taylor*, in consideration, &c. do give, grant, &c. the aforesaid bargained premises, together with, &c. and do by these presents forever warrant and defend the aforesaid land and premises to the said *Robert Godley*, his heirs, &c." The deed was dated September 17th, 1814. The plaintiff took possession under it, and was evicted by paramount title, on the 1st of June, 1828. *William Haddock* died in December 1820, and the defendant, *Frederick Haddock*, proved his will in September following, and this suit was commenced in February, 1829. Upon these facts his Honor being of opinion for the plaintiff, as to the plea of the defendant *Haddock*, but thinking that neither the defendant *Taylor*, nor the testator of the defendant *Haddock*, were personally bound by the covenant, set the verdict aside, and entered a nonsuit, and the plaintiff appealed.

Gaston, for the plaintiff.

Hogg, *contra*.

HALL, Judge.—Where an agent wishes to be excused from obligations or covenants into which he enters, he should affix the name of his principal to the deed. (*Wilkes* v. *Back*. 2 *East* 142). When he does not do so, but only signs his own name as agent, he is personally answerable. For in such case he undertakes for his principal. (*Appleton* v. *Binks*, 5 *East* 148). He undertakes as agent, or as surety for his principal, that if the latter will not perform the contract, he will answer for him, in the manner stipulated.

The case of *Potts* v. *Lazarus* (2 *Law Rep.* 83) seems to have been decided in part upon the ground, that public and private agents were subjected to the same liability. Of late however, their obligations are considered to be very different; the first standing upon the principles of policy; the latter left to meet the contract, as the law of the case shall decide.

The case of *Potts* v. *Lazarus*, (2 *Law Rep.* 83,) questioned by HALL, J.

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In the present case, it is true, the defendants could not have signed their principal's name; but as other agents, they could and did sign as agents or as executors; in which case the rule is equally strong, that they shall be bound as agents to the fulfilment of any contract into which they enter. If this should not be considered to be the case, such contracts or covenants would be mere nullities. For the covenantees could have no remedy upon the covenants against the testator.

This subject is so fully and satisfactorily examined in *Sumner* v. *Williams* (8 *Mass. Rep.* 162) that the best service I can render the subject will be to refer to it.

It was also insisted for the defendant, *Haddock*, that he was protected from the recovery sought by the plaintiff, by the lapse of seven years after the death of his testator, before suit brought against him by the plaintiff; altho' the fact is, that the cause of action had not accrued, until within seven years next before the action was brought. The act of 1715 (*Rev*, *c.* 10, *s.* 7) the protection of which is claimed in this case, is in the following words: "That creditors of any person deceased shall make their claim within seven years after the death of such debtor; otherwise such creditor shall be forever barred." To give operation to the act, there must not only be a creditor, but there must be a claim. What is a claim? It is defined to be a challenge by a man of the property or ownership of a thing, which he has not in possession, but which is wrongfully detained from him. (*Plow.* 359.) It is either verbal, or it is by an action brought. It relates to lands, or goods and chattels. (*Shep. Ab. Claim. Jacob's Law Dict. Claim.*) *Johnson* defines a claim to be "a demand of any thing due; a title to any privilege or possession in the hands of another; a demand of any thing that is in the possession of another." When the legislature say, that creditors shall make their claim within seven years after the death of the testator, they must have had in contemplation such a creditor as had a *claim* to make; such a claim as might be enforced *in præsenti*. They did not mean a claim that might arise *in futuro*; which could not be enforced until it did arise or accrue.

By an equitable construction of the act, he must make his claim within seven years after it accrues. To require him to make it before, would be to require of him an impossibility.

Per HALL, J. The statute of limitation never begins to run until a cause of action has accrued, as well as until there is a claimant in existence.

The statutes of limitation generally begin to run after the cause of action has accrued. Chief-Justice *Abbott* says in *Murray* v. *The E. I. Co.* (7 *Eng. C. L.* 66,) that "it cannot be said, that a cause of action exists, unless there be also a person in existence, capable of suing." Would not his Lordship have been equally orthodox, if he had also said, although there is a creditor in existence, yet if there is no *claim*, or cause of action, the statute of limitation will not run. The Chief-Justice further observed in that case, that the several statutes of limitation, being all *in pari materia*, ought to receive a uniform construction, notwithstanding any slight variations in phraseology—the object and intention being the same.

The case of *Jones* v. *Brodie*, (3 *Mur.* 594) and the case of *McLellan* v. *Hill*, (*Conf. Rep.* 479,) as explained in *Jones* v. *Brodie*, approved by HALL, J.

So in the case of *Jones* v. *Brodie*, (3 *Mur.* 594.) it was held, in regard to the statute of limitation now under consideration, that if there was no creditor who could sue at the death of the debtor, the statute did not begin to run. So I think, altho' there is a creditor, but no claim that can be enforced, the statute will not run until there is such a claim. From the account which is given of *McLellan* v. *Hill*, (*Conf. Rep.* 479) in *Jones* v. *Brodie*, I think it was rightly decided. But in the printed report of it, no notice is taken of the fact, that the debtor died before the creditor. Nor does the judgment of the court seem to be based upon that circumstance. And so far as the reasoning in that case is adverse to the opinion delivered in *Jones* v. *Brodie*, I do not subscribe to it. One reason given for the opinion of the court in that case was, that executors and administrators after seven years were obliged to pay over whatever assets remained in their hands to the churchwardens, or to the treasurer of the state, for the benefit of creditors. My answer is, that it ought to appear, that it was paid over. If it was not, it was answerable to creditors. If it was paid over, it should not have prevented creditors from obtaining judgments; but it might have been a good reason for not fixing the executor with assets.

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Certainly much consideration is due to the sanctity of contracts, provided they are within the pale of the law. A man may legally contract, that he and his executors will indemnify a purchaser in case of *eviction*; which may not happen until many years after his death. He may contract that a thing may be done after his death. He may give a bond payable in ten years, and die the next day.

The legislatures of the states are enjoined from passing any law impairing the obligation of contracts; and the alarm was taken in this state, when the legislature passed a law postponing the time for the fulfilment of a contract. (*Jones* v. *Crittenden*, 1 *Law Rep.* 385.) How cautious then should courts be, in giving judgment upon the construction of an act of Assembly, which will cut them off from fulfilment altogether. I see nothing in policy, which should lead to such a result. For if after seven years, the executors or administrators have paid over the assets to the University, which is now authorized to receive them, instead of the church-wardens and treasurer of the state, they are not to be charged with assets. But the creditor is entitled to a judgment, which will be his passport to a remedy against the trustees of the University.

An executor who has paid over the assets to the University is not subjected to the claim of a creditor, not barred by the act of 1715; but the issue of fully administered must be found for him, and the creditor must proceed against the University.

The statutes of limitation generally give a specified time to sue in. Creditors may avail themselves of it; if they do not, they are barred. In the present case no time is given to sue in; and the contract becomes a mere nullity. The obligation of it is totally impaired.

RUFFIN, Judge, *dissentiente*.—I retain the opinion on the act of 1715, which I delivered in *Rayner* v. *Watford*. (*ante* 2 *vol.* 338;) and think the action against the executor of *Haddock* is barred. My reasons are so fully stated there, that I need not now go into the question at length. I will only observe, that the only term at which the statute makes the time begin to run is *the death* of the debtor. We have no power, I think, to interpolate the words, "if the creditor's action had then accrued," or "seven years from the time the action shall have accru-

ed, if it shall arise after such debtor's death" ; which is the reading the senior members of the court and the case of *Jones* v. *Brodie* give, as being within its equity. Besides the objection of thus making additions to the law, I have others to this interpretation. The act has no saving in favor of infants or others. Now an infant lunatic or *feme covert* is at least as much an object of protection, as an imprudent creditor who trusts another seven years. This want of any saving shows it was intended to make the time a *conclusive* bar in *all* cases. But if the time is to run only against those claimants, who could claim, that is, bring suit, it will expose executors to ruin, by subjecting them to recoveries, after they have delivered over all the assets. For there is nothing in the act to justify the payment of legatees, or to the wardens, until creditors are satisfied ; since only such money, as may remain after answering those demands, is to be thus paid ; and there is no provision for refunding bonds. Here again it is said, that an equitable interpretation is to be made in favor of the executor, reciprocal to that already made in favor of the creditor ; and that the executor may upon the plea of fully administered, show that the assets are not in his hands, but those of the legatees or trustees of the University ; but that if the executor yet retains them, it is just he should pay the creditor. I answer first, that there is nothing in the statute authorizing the inquiry into the state of the assets ; secondly, that the act is a protection to the legatee, as well as the executor ; thirdly, that it is also a protection to the heir, as well as the two former ; and this construction repeals it as to legatees and heirs, because they can deliver over the assets to nobody, but must have them in their hands, unless exhausted by other creditors. Suppose a simple contract debt, or one in which the heir is not specially bound, to fall due eight years after the death of the testator, and that the executor is sued, and the plea of fully administered is found for him upon this ground, that he has delivered over the estate at the end of seven years to the wardens ; and then a *scire facias* to issue upon the judgment for the debt against the heir. Shall he be bound

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before the personal estate is exhausted by creditors? Yet how is the creditor to get at the personal estate? He cannot proceed at law against the legatees or wardens. The heir is liable upon such a finding, by the express words of the act of 1784, and in no other case but in that of the insolvency of the executor, according to the act of 1807. Yet he must pay the debt in this case, without the insolvency of the executor, or the creditor's recovery will be fruitless; because there is no method of subjecting the personal assets in the hands which now hold them, that is to say the legatees or wardens.

For these reasons, my former opinion has been confirmed by reflection; and I have felt myself bound to express it. But in future, I shall consider myself under an equal obligation to hold for law, what I understand, in conference with my elder brethren, to be their opinions. That is, that if the debt be due at the death of the debtor, claim must be made within seven years from the death, otherwise both the heir and executor are discharged: and that if the action arise after the death of the debtor, suit must be brought within seven years from the time the action accrued, or the heir and executor will in that case also be discharged: and if the suit be brought against the executor within seven years after it arose, but after the expiration of the seven years from the death of the debtor, and the executor hath, at the time of the suit brought, not paid over the assets, he shall answer the demand; but if he hath paid them over, he shall have the plea of fully administered found for him. But how it will be with the heir in this last case, is yet to be determined; though I take it, he is to be bound, in case there be no personal estate in any body's hands, provided he be sued by *sci. fa.* within seven years from the falling due of the demand, when that happens after the death of his ancestor; if he be sued within that time in debt on bond, in which he is named, whether there be personal assets or not.

PER CURIAM.—JUDGMENT AFFIRMED.

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CORNELIUS DOWD *qui tam* v. GIDEON SEAWELL.

In debt on the act of 1778 (*Rev. c.* 134) for marrying a couple without a licence, if the writ demand £50, the penalty imposed by the act, and the jury find a verdict for £24,10, the sum to which the penalty is scaled, it is a variance for which the judgment will be arrested.

DEBT, upon the statute prescribing the rules to be observed in solemnizing the rites of matrimony. The writ demanded "fifty pounds, which he, (the defendant) owes "and unjustly detains, to his damage one hundred dol- "lars, due for having solemnized the rites of matrimony "between, &c. contrary to the act of the General Assem- "bly in such case made and provided."

Upon *nil debet* pleaded, the jury, before his Honor Judge STRANGE, at Moore, on the last circuit, returned the following verdict, "that the defendant does owe the sum of fifty pounds, reduced by the scale to twenty-four pounds ten shillings." His Honor, upon the motion of the defendant's counsel, arrested the judgment, and the plaintiff appealed.

No counsel appeared for the plaintiff.

Winston, for the defendant.

RUFFIN, Judge.—We think the decision of the Superior Court right, and that the judgment must be arrested.

It is an action of debt for the penalty for marrying a couple without a licence. The sum demanded is *one hundred dollars;* and the verdict is for *twenty-four pounds ten shillings.* The act of 1778, (*Rev. c.* 134,) gives a penalty of £50; which, when scaled, amounts to the sum found by the jury.

In debt, the exact sum demanded in the writ need not be found by the jury, when from the nature of the demand it is uncertain.

It was formerly thought that the action of debt, being for an entire thing, could not be maintained unless the exact sum—neither more nor less—was recovered. This is not now so considered, nor has been for a long time. And the rule is, that in actions, where from the nature of the demand the true debt is uncertain, it may be alleged to be large enough to cover the real debt, and there shall be a verdict according to the truth, and judgment

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thereon. Hence, in debt on simple contract, the declaration is good altho' the sums demanded in several counts do not amount to or exceed the sum demanded in the writ, or the recital of it in the beginning of the declaration. (*McQuillin* v. *Cox*, 1 *H. Bl.* 249. *Lord* v. *Houstoun*, 11 *East.* 62.) And in *Aylett* v. *Lowe*, (2 *Bl. Rep.* 1221,) it was held, that upon a verdict for £ 100 in debt for £ 200, on a *mutuatus*, there should be judgment for the plaintiff. And so too in debt on a specialty, if the deed does not of itself show the certainty of the whole demand, but the extent is matter of proof *aliunde*, the verdict may be according to the truth, and if it be within the sum demanded, there shall be judgment for the plaintiff; as in *Incledon* v. *Crips*, (2 *Salk.* 558, *S. C.* 2 *Ld. Raym.* 814,) which was debt on a bond, whereby the defendant obliged himself to pay the plaintiff £ 35 for every hundred stacks of wood, and he averred that he delivered a certain number of hundred and one half, which came to £ 182,10. Upon demurrer it was held, that there could be no apportionment on this contract for the half hundred, and therefore the plaintiff could not have judgment for that: but it was further held, that he might remit that, and have judgment for the rest; because the debt might be more or less by matter extrinsic of the deed, and therefore there was no variance between the deed and the verdict. And this observation shows the true rule; namely, that where the sum demanded is shown in the declaration to be on a contract or other matter, which in itself conclusively fixes the amount due thereon, then the recovery must agree with the demand. For the debt on that contract is that or nothing. This is not because in debt a sum *in numero* is claimed; but for the more substantial reason, that if the recovery of more or less were allowed, there would be a variance between the *allegata* and *probata*, and the declaration would convey to the defendant no information of the cause of action. Where the verdict therefore may stand with the contract set forth in the declaration, and both be true, there shall be judgment. Where the verdict cannot be made to accord with the contract, there can-

But where the contract, as stated in the declation, fixes the amount due, the verdict must agree with the writ, or the judgment will be arrested.

Not because a specific sum is claimed, but because there is a variance betw'n the declaration and the proof.

not be judgment, as in debt on bond for £ 100, a verdict for $ 100 is not good, because it could not be for the debt created by the specialty sued on. It is the same upon any written instrument, as upon a bond; if it be declared on as a writing, constituting in itself a substantial contract, as a promissory note. It is not the instrument described, and therefore cannot be received in evidence.

The same principle applies to actions of debt on penal statutes

The same principles apply to actions of debt for penalties given by statutes. As in every case, the declaration must set out the matter, whether of contract or law, whereby the demand arises; so in these actions, the plaintiff must show a statute giving the penalty demanded by him, and charge the acts, which show the defendant to be guilty of the offence within the statute. These allegations are indispensable to enable the defendant to know for what he is sued, and to protect himself by plea in another action for the same matter. Anciently the statute was set out at full length. That was relaxed, and stating it by its title was then allowed. Afterwards a general reference to it, by alleging the particular penalties given thereby, and concluding "against the form of the statute" was held sufficient, upon the grounds that the court was bound to take notice of all public laws, and that the particular statute was sufficiently identified by the statement of the penalty, and of the acts forbidden by it. But certainly there must be some description of it; and if there be no reference to it, the declaration is bad. (*Scroter* v. *Harrington*, 1 *Hawks* 192. *Myddleton* v. *Wynn. Willes* 599.)

If the statute inflicts a penalty to be measured by reference to some uncertain standard, the verdict stands well with the declaration, although they do not agree.

If however the statute itself give an uncertain penalty, or a penalty to be measured by reference to some uncertain thing, then the sum demanded is not conclusive on the plaintiff; but he may recover according to the certainty made by his proof, because he can do no more towards a more definite description of the statute or of the debt. In an action therefore for substracting tithes against the *stat.* 2 & 3 *Ed.* 6, which gives the treble value, the judgment shall be according to the verdict, tho' different from the sum demanded. (*Pemberton* v. *Skelton*, *Cro. Jac.* 498.) The court say there, that the variance

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is no objection, because the statute gives no certain sum, but only so much in reference to the value; and the value cannot be positively estimated until it is done by the jury themselves. And the judges distinguish that case from an action grounded on a specialty, in which the certainty of the debt appears, and from an action grounded on a *statute which gives a sum certain*; in both which the precise sum must be demanded. This last position is, to be sure, but a *dictum* in that case; but it is the point of the decision in *Cunningham* v. *Bennett*, (1 *Geo.* 1 *C. B.*) stated by Mr. Justice *Buller* in his *Nisi Prius*, a book of much authority. There it was held, that a penal action could not be for less than the penalty given by the statute; and tho' the plaintiff had a verdict, judgment was arrested. I conclude therefore that wherever a statute gives a certain sum *in numero*, that exact sum must be demanded: else it cannot be taken to be the penalty given *by that statute*. Here the declaration conforms neither to the act of 1741, nor that of 1778. The former gives £50 proclamation money to the use of the parish, or by the act of 1777, to that of the county. The latter gives £50, scaled to £24,10, one half to the informer, and the other to the county. Consequently the judgment must be arrested for this reason.

But if the penalty be certain, the very sum demanded by the writ must be found by the jury.

The other objection, that damages are demanded, is not a good one. They cannot be recovered, but it is not error to demand them. The case of *Frederick* v. *Lookup* (4 *Burrows* 2018,) shows this; for the judgment was reversed only as to the damages assessed, and affirmed for the debt, which was the penalty.

Damages cannot be recovered in debt on a penal statute, but it is not error to demand them.

PER CURIAM.—JUDGMENT AFFIRMED.

DEN *ex dem. of the* TRUSTEES OF THE UNIVERSITY v. JOSHUA MILLER.

The treaty of 1782 between the United States and the Netherlands provides, that the subjects of either party may dispose of their *effects* by testament, and that their heirs shall receive such succession *ab intestato*, although not naturalized. It was held, that the word *effects* includes real as well as personal estate.

EJECTMENT, in which the lessors of the plaintiff claimed the lands in dispute, as being late the property of *Ca-*

tharine Haslin, who had died without leaving heirs; and in order to determine the question between the parties, the following facts were submitted to the court in the form of a case agreed:

Wilson Blount being seized in fee of the land in question, on the 25th of February 1799, conveyed it to *Edward Kean*, upon trust that *Kean* should at any time, upon the request of *John Haslin*, of Demerara in South America, or of *Catharine H. Haslin*, wife of said *John*, in case she sould survive her husband, convey the same in fee simple to persons qualified to take, hold and transfer lands in this state, as the said *John*, or as the said *Catharine* surviving him, should appoint. *John Haslin* died in March, 1804, and *Edward Kean* shortly thereafter, leaving two infant children, his heirs at law. *Catharine H. Haslin* was born in December, 1757, within the dominions and a subject of the United Netherlands, and on the 21st of May, 1805, being then in the United States, was naturalized as a citizen of the United States, if the following document conclusively proves such naturalization: "To all to whom these presents shall come: be "it known, that it appears to the justices of the Justi- "ces' Court in and for the city and county of New York, "at the city hall of the said city, that on the 21st day of "May, A. D. 1805, *Catharine Henrietta Haslin* was na- "turalized in the Justices' Court of the said city, as ap- "pears from the records of the said court, and that a true "copy of the certificate of such naturalization was gran- "ted on the day and year aforesaid"; which certificate is the only evidence that *Catharine H. Haslin* ever was naturalized. Directly after the 21st of May, 1805, the said *Catharine H. Haslin* removed to France, and there resided until her death. Soon after her arrival in France, the said *Catharine H. Haslin* made an appointment, whereby she required the heirs of *Edward Kean* to convey the premises in dispute to herself in fee. The heirs of *Kean* not conveying according to this appointment, the said *Catharine H. Haslin* instituted a suit in equity against them, and in October, 1818, obtained a decree, whereby the surviving heir of *Kean* was directed, within six months

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after his arrival at full age, to convey the said land according to the said appointment, unless upon being served with a copy of the decree he should show cause to the contrary; and by the said decree the said *Catharine* was put immediately in possession of the said lands.

On the 4th of August, 1819, the said *Catharine* at Paris in France, being then possessed of valuable effects in France, made her last will in writing, with the solemnities necessary to pass land in North Carolina, and thereby devised, with the exception of some small pecuniary legacies, all her property to *Ann Caroline*, wife of *Francis Gilbert Lefebre*, whom the said *Catharine* had adopted as her daughter according to the laws of France, and in January, 1821, died without having altered or revoked the said will.

Ann Caroline Lefebre was born in the year 1787, within the dominion and a subject of the United Netherlands, resided in Demerara until the death of *John Haslin*, accompanied *Catharine H. Haslin* to the United States in the year 1805, and in the same year removed with her to France, where on the 5th of July, 1807, she married *Francis Gilbert Lefebre*, a native subject and domiciled inhabitant of France. *Ann Caroline Lefebre*, from the year 1805 to her death, was domiciled in France.

On the 21st of December, 1820, *Thomas Kean*, the surviving son of *Edward Kean*, having attained his full age, and being required under the before mentioned decree, duly conveyed the premises in dispute to *Catharine H. Haslin*.

At the death of the said *Catharine H. Haslin*, there was living at the Hague in the kingdom of the Netherlands an only sister of the said *Catharine*, *Elizabeth Mary Van Hommel*, who was born within the dominion and a subject of the United Netherlands. But the said *Catharine* left no relative who was a citizen of the United States. In April, 1825, *Ann Caroline Lefebre* died, leaving two children, her issue by her said husband, who were born in France, have ever resided and still reside there. The said *Ann Caroline* also left her surviving a brother, *Johannis William Laurisant*, who was born within the do-

minions of the United Netherlands, and is yet living a subject of the king of the Netherlands—but the said *Ann Caroline* left no relative who was a citizen of the United States. The case then stated the various changes of government, which had taken place in the United Netherlands, which it is unnecessary to present, and proceeded as follows: The treaty concluded at the Hague on the 8th of October, A. D. 1782, between the United States of America and the States General of the United Netherlands, is regarded by the executive authorities of both countries, as being in full force between the United States and the king of the Netherlands. The convention of navigation and commerce, concluded at Washington on the 24th of June, 1822, is the only treaty between the United States and the king of France, which is considered by the executive of the United States to be in force.

If upon these facts the lessors of the plaintiff had title at any time before the 1st of May, 1825, judgment was to be entered for the plaintiff—if otherwise, for the defendant.

His Honor Judge MARTIN, at Craven, on the spring circuit of 1828, at the request of the counsel, and to enable the cause to be brought to this court, gave judgment *pro forma* for the plaintiff, and the defendant appealed.

The case was argued at June term, 1831, by

Gaston, for the defendant.

Devereux, for the plaintiff.

HENDERSON, Chief-Justice.—The trustees claim the land in question, as an escheat upon the death of *Catharine Haslin* without heirs; and they insist, that the certificate of naturalization, which *Mrs. Haslin* has obtained, does not prove, that she has been naturalized under the law of the United States. To me that question appears immaterial. If she was an alien, and so continued until her death, she was capable of acquiring by purchase, and holding real estate against all but the sovereign; and even against the sovereign, until her estate was divested by an office found, establishing the fact of

An alien can hold lands agn'st the sovereign, until his estate is divested by an inquisition ascertaining his alienage.

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her alienage, or by some sovereign act declaring that fact, as by an act of the legislature, or by seizing these lands, (in the same capacity,) as forfeited by it; and perhaps by other means. But is clear, that the sovereign cannot seize these lands, and upon the trial of an action for them prove the alienage by parol, or other evidence *in pais*, as is attempted to be done in this case. As well might the state bring an action for the lands of a citizen, alleging that he had forfeited them for felony, and on the trial prove *by witnesses*, that he had committed murder, and thereby forfeited his estate—whereas it is the well established law, that a felony can be proven by a record of his attainder only, which is an office found establishing the fact. But there is another, and equally strong ground, to resist such an attempt. *Mrs. Haslin* is now dead; and the law has cast the estate upon her heirs, if she has any, and their estate cannot be divested by an office now found, establishing her alienage, or proving the fact in any other manner. For suppose she had left a child born within the United States. Can there be a doubt, that it would have succeeded to these lands as her heir. In fact, the plaintiffs claim this estate because she left no heirs at her death. Without that being the case, there can be no escheat, as it is out of the question to claim the land as forfeited by reason of her alienage, both for want of an inquest of office, and from the fact that she died seised. I say they affirm, that she died without heirs, as an escheat arises only on the death of the tenant without an heir, or what is the same thing, an heir qualified to take. But in this case the lessors of the plaintiff go further, and affirm, that she was qualified to take and hold lands according to the laws of the state; for to such, and such only was *Kean*, by the power in the deed from *Blount* to him, authorized to convey. And although there is nothing like an estoppel in this case, as the lessors of the plaintiff were not parties nor privies to the deed, nor parties to the suit, in which it was decreed, that *Kean's* heirs should convey to *Mrs. Haslin*, yet they affirm both these facts, by claiming these lands as an escheat for want of heirs to *Mrs. Haslin*. For as was said be-

The sovereign cannot seize lands, and prove the alienage *in pais* upon the trial of an ejectment. It can be proved only by an office found. So in cases of forfeiture for felony, the record of the attainder of the tenant must be produced.

The native born child of an alien succeeds as heir, where the estate of the ancestor has not been divested by an office found in his life time. An office found after his death does not affect the estate of the heir.

fore, the estate *did not pass to her*, if she was incapable of receiving it under the power in *Blount's* deed. And therefore it remains in *Kean*. It would be the same thing in a deed not made under a power. For if there is no grantee capable of receiving a thing attempted to be granted, it remains where it was. But where *the heirs* come to claim as heirs, if they are aliens, there needs no office found to ascertain that fact. They must *show* their capacity to take and hold. The *want* of it need not be shown; for the *law* will not cast an estate on him, who cannot hold it against all, even against the sovereign.

The law will not cast an estate upon one who cannot hold it; and for this reason an inquest of office is not necessary to prevent an alien from succeeding to an estate.

This brings before us the construction and effect of the treaty with the States General of the United Netherlands, made in the year 1782. I need not state the various revolutions and changes, which that government has undergone, and its present form; nor attempt to support by reasoning, why treaties are, or ought to be binding upon the people of the same countries, although both or one of the governments have undergone revolutions or changes. This does not belong to this department of the government. We can know our exterior relations only through that branch or organ of the government, appointed by the form of it, to represent and act for us with foreign powers. The case states, that that organ or department of the government still considers the treaty as binding on us; and of course on the people of the other contracting party.

Courts cannot judicially notice what treaties with foreign countries are in force. This question must be determined by the executive.

The next question is the effect of that treaty on the case. By the sixth article it is provided, that the subjects of either party may dispose of their *effects* by testament, donation or otherwise; and their *heirs*, subjects of one of the parties, shall receive such successions *ab intestato*, even though they have not received letters of naturalization. And if the *heirs* to whom such succession falls shall be minors, their guardian or curator may govern, direct and alienate the *effects* fallen to such minors by *inheritance*. If this case rested on the meaning to be given to the word *effects*, even without a context, I should think, being found where it is, in a treaty between powers having no common technical terms, in fact not a

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common language, that it included things immovable as well as movable. In the first place, the instrument is to receive an extended and liberal construction; not like the contract of individuals, where nothing is presumed to be granted, but what falls plainly within the words of the grant. But in this case, unless the meaning of the word be extended to things immovable, nothing at all is granted by the word *effects*. For by our law, alienage is no objection to the acquisition of movables in any way, either by purchase, or succession *ab intestato*. And so I presume it is in the States General. If not, to obtain it by pretending to grant something in lieu of it, when in fact nothing was granted, is a trick which I would not, even in argument, impute to our negotiator. But taken with the context, I think there cannot be a doubt. The words *succession ab intestato*, are a well known term of the civil law; a law, on which the laws of continental Europe may be said to be based. By that law, it includes successsion to immovable as well as movable estates. And to use terms, which by this almost universal law, would give to our citizens the right to succeed to immovable estates, and deny it to them by any restricted sense, to which we might confine the terms, is not presumed to have been the intent of either party. I say to give to our citizens, because if the civil law prevails in the Netherlands, and I presume it does, it would do so. But why negotiate in the terms of the laws of the Netherlands, and not in the terms of our laws? The answer is, our laws are peculiar to us, and the English—the civil law, common to all continental Europe. But there are terms in the context, which even in our law, would give to this word *effects* an immovable character. In the civil law, he who succeeds to the estate of a dead man, either movable or immovable, is called heir. By our law, the term is confined to him who succeeds to his immovable, or rather real estate. By the civil law, inheritances embrace movable as well as immovable estates. By our law, the term is confined to immovable estates; at least, it does not embrace what we call chattels. But in the treaty, both the word *heirs*

and the word *inheritances* are used. How shall they be understood; according to our laws or theirs? If by our laws, and goods only are to be included, we shall have in our legal phraseology, new to be sure, *heirs claiming money and other personal goods, descending from their ancestor as their inheritance.* It is very plain, I think, that it was intended to embrace all kinds of property by the treaty; and therefore the lands in question are embraced by it. Effects descending by inheritance must include land.

The case further states, that after the said *Catharine Haslin* had appointed that the heirs of *Kean* should convey the lands in question to her, she removed to France, and devised to *Anne Caroline Louisa*, with some trifling exceptions, *all* that she possessed or should *possess at her death.* That after the making of the will, the heirs of *Kean* conveyed to *Mrs. Haslin* the legal estate in the lands in question; and that *Mrs. Haslin* afterwards died. That *Anne Caroline Louisa* was born within the dominion of the United Netherlands. That *Mrs. Haslin*, in France, where they both resided, adopted her as her daughter and heir according to the laws of France. That the said *Anne Caroline* married, and was domiciled in France. That she died after *Mrs. Haslin*, leaving two children, born in France, who are still alive. That *Mrs. Haslin* left surviving her an only sister residing at the Hague, born in the United Netherlands, and a citizen thereof.

An intricate question, intended to be presented, does not arise for two reasons, which I will presently give. The question is, whether a child of a Netherlander, who was born in France, is within the protection either of the French treaty, or the Dutch treaty; or both combined; and if either, which. For *Anne Caroline Louisa*, the adopted daughter and devisee of *Mrs. Haslin*, was a Netherlander, married and domiciled in France, where she had two children and died. This question is not presented; for *Anne Caroline Louisa* did not take these lands by devise; as at the date of the will, *Mrs. Haslin* had no estate in them. She had only a right to call for an estate. And at the time of her death, she had obtain-

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ed the legal estate from the heirs of *Kean*. If the estate had remained as it was at the date of the will, that is, a right in *Mrs. Haslin* to call for it, it would have passed, that is, a right to call for it would have passed to the devisee. The estate being changed at *Mrs. Haslin's* death, neither passed; not the first, for it was extinguished by the deed; not the last, because it was not in *Mrs. Haslin*, when she made the will. If such reasons as these satisfy the makers of the law, it is not for me to complain. It would disgrace those who are emphatically called lawgivers. But the law is so written, and I cannot alter it. The other reason is, that the plaintiffs are not interested in the question; nor were they in the other. For if the French children of *Anne Caroline* do not take, the Dutch heirs will. For an alien child does not exclude a more remote heir. It it is the *heir* who can, and not *he who cannot take*, which excludes another heir. When I say *can*, I mean who once could. He who once could have taken, but loses his capacity by a *personal* disqualification does exclude others; as an attainted son excludes a brother; or an elder attainted son excludes a younger son. But not so with those who never could take. It is therefore unnecessary to consider this or any other question, as to who is the heir of *Mrs. Haslin*. For the plaintiffs have no interest in them. If she had *any* heir, it excludes them. As it appears, that *Mrs. Haslin* left a sister, a subject of the States General, and as by the treaty, the sister is heir to her, if no other is found, *Mrs. Haslin* is not dead without heirs capable of succeeding to her estate in these lands. There is therefore no escheat, and the plaintiffs are not entitled to recover.

If the heir be unable to take by reason of any disqualification, which is not personal, as by his alienage, the next in degree succeeds, to prevent an escheat. But where the disability is personal, as by an attainder, the next in degree cannot succeed, but the estate will escheat.

Although our lexicographers, and Dr. *Johnson* at their head, give to the word *effects* the meaning of things movable, yet one of the instances, which he adduces to show that the word is used according to his exposition, proves, I think, the contrary.

> "Shall I lose the *effects* for which I did the murder,
> "My *crown*, my own ambition, and my queen."

By the word *crown* the speaker meant not the crown or cap, which encircled his brow, but the realm over which

he reigned. However this may be, by the words of the treaty *the effects* are the *inheritances* which are to descend to the *heir*. This gives to the word a meaning, which cannot be misunderstood.

Lord Coke, in treating of the capacity of grantees, says that *prima facie* all can take and hold estates; but some can take, and cannot hold; some can take and hold until the estate is divested; and some cannot either take or hold. Of those who can take and cannot hold is an attainted person. He takes, but *instanter* the estate is in the king. An alien can take and hold until office found. In both these cases, the estate passes out of the grantor, and becomes vested in some one; while a monster, not having human shape, can neither take nor hold; and is not recognized as a human being. The grant might as well be to a horse, or any of the brute creation. In such case, the estate never passes from the grantor. It remains where it was. So it is I believe with a person professed, who is dead in law. He may make his executor, and his estate descends on his heirs. But why argue this point? The plaintiffs themselves affirm it. For if *Mrs. Haslin* did not take, the estate is still in *Kean's* heirs. If so, they have no shadow of right. If *Mrs. Haslin* took the lands, they descended to her heirs, whether pointed out by the common or statute law, or by treaty. The only effect the treaty has, or was intended to have in such case, was to do away the objection of alienage; not to prescribe to us, who should be the heirs. If a Dutch subject was to die now, owning lands in this state, those who are his heirs under our act of 1808 would succeed; not those who would have succeeded by the common law in 1782, when the treaty was made; nor those who are his heirs by the Dutch law. These observations are made in opposition to the claim of *Anne Caroline*, the adopted daughter, and heir by the laws of France. But this question, as has been said before, is immaterial to the plaintiffs. For *any* heir will exclude them; and the adverse claims of the others are not now in litigation.

PER CURIAM.—JUDGMENT REVERSED.

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RICHARD GRIST *admr. of* DANIEL CAMPBELL

v.

WILSON B. HODGES *ex'r. of* HENRY CLARKE.

One having title to land, part of which is under cultivation, and part in woods unenclosed, is taken to be in actual possession of the whole tract.

Although the rule of damages upon an eviction from a particular estate may differ from that upon an eviction of the fee, yet where the deed conveys a life estate, and the whole interest was lost without any enjoyment by the vendee, he is entitled to recover his purchase money and interest.

The case of *Coble* v. *Wellborn* (*ante* 2d *vol.* 388) approved.

This was an action for the breach of a covenant of quiet enjoyment, in a deed from the testator of the defendant to the intestate of the plaintiff, conveying to the latter an estate for life in two hundred acres of land. The breach assigned was the eviction of the bargainee from ninety acres of the land by one *Wingfield*, under a better title than that of the bargainor. Upon *non est factum* and *performance* pleaded by the defendant, the case was, that at the execution of the deed, *Wingfield* was in the actual possession of a part of the land, having it under fence, and that he had title not only to that part which was in his actual possession under cultivation, but also to some adjoining it in woods, amounting altogether to ninety acres—that the intestate of the plaintiff in his life time commenced an action of ejectment against *Wingfield*, in which he failed, in consequence of the better title of *Wingfield*.

It was contended for the defendant,

1st. That the evidence offered did not prove an eviction, as the bargainee never had been in possession.

2d. That as to so much of the ninety acres, to which *Wingfield* had title which was not enclosed, the plaintiff could not recover.

3d. That if *Wingfield* was in actual adverse possession of any part of the land at the execution of the deed, the plaintiff could not recover for an eviction of his intestate thereupon, by the person having a better title thereto, al-

though the intestate had a good title under the same deed to other parts of the land therein described.

4th. That the conveyance being for a less estate than a fee, the rule of damages was not the original purchase money and interest.

5th. That the action ought to have been brought by the heir of the intestate, and not by his personal representative.

His Honor Judge Donnell charged the jury, that if they were satisfied that *Wingfield* was in possession of the ninety acres, under a valid title at the execution of the deed, and cultivating a part of it which was inclosed, and that he had succeeded in the ejectment brought by the plaintiff's intestate, by setting up his valid title; this was in law such a disturbance of the possession of the intestate, as would entitle him to recover in an action upon the covenant of quiet enjoyment, contained in his deed—and further, that the present action was properly brought by the personal representative—and that the rule of damages for the breach of a covenant of quiet enjoyment, in a deed conveying a life estate was the same as that in a deed conveying the fee.

The jury returned a verdict for the plaintiff, and assessed his damages at $2334, and the defendant appealed.

J. H. Bryan, for the defendant insisted,

1st. That an adverse possession at the date of the conveyance is not tantamount to an eviction. The vendee cannot recover upon his covenant, unless he has been in possession. (*Waldron* v. *McCarty*, 3 *John.* 471 *Kortz* v. *Carpenter*, 5 *Johns.* 120. *Kerr* v. *Shaw*, 13 *Johns.* 236. *Marston* v. *Hobbs*, 2 *Mass. Rep.* 433. *Coble* v. *Welborn*, *ante* 2d *vol.* 388. *Day* v. *Chism*, 10 *Wheat.* 449).

2d. The action should have been brought by the heir, and not by the personal representative. (*Kingdon* v. *Nottle*, 1 *M. & S.* 355, 4 *Id.* 53).

Upon an intimation from the court that these points were against him, the counsel read, from the copy of the record certified to this court, the original writ, in which the damages were laid at $1500, and moved in arrest of

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judgment because the verdict was for $2334, unless the plaintiff would remit the excess.

Gaston, for the plaintiff, moved for leave to amend the writ, by increasing the amount of the damages.

RUFFIN, Judge.—All the cases cited for the defendant, upon the point of eviction, except one, are those where the bargainee was in possession, and fall within the hard rule, which this court was constrained to adopt in *Coble* v. *Wellborn*, (*ante 2d vol.* 388). The existence of an incumbrance, or the mere recovery in a possessory action, under which the bargainee has not actually been disturbed, are held, for technical reasons, not to be breaches of a covenant for quiet possession, or in other words, of our warranties. But that is a very different case from this; in which the bargainee never in fact was in possession, but was kept out by the possession of another, under better title, existing at the time of the sale and deed, and ever since. The case of *Kortz* v. *Carpenter* is of the same character. But it is distinguishable from the present; for there had been no attempt in that case to get possession. Here there was, by ejectment. I do not however think that was necessary; but the existence of a better title, with an actual possession under it in another, is of itself a breach of the covenant. It is manifestly just, that it should be so considered; for otherwise the covenantee would have no redress, but by making himself a trespasser by an actual entry, which the law requires of nobody; or by bringing an unnecessary suit; for the event of that suit proves nothing in the action on the covenant. But upon purely legal grounds, it is so. For as between the bargainor and bargainee, the latter is in by force of the statute of uses. It is upon that idea, that the legal title is acquired by a deed of bargain and sale. It passes the use, and the statute carries the possession. It is so in the conveyance by lease and release. There must be a possession for the latter to operate on. But it is not an actual possession—at least, the actual entry need not be proved. The statute transfers the possession, and the lessor cannot say it was not actual, for

The mere existence of a better title, without an eviction under it, does not entitle the bargainee to recover upon a covenant of quiet enjoyment.

But the existence of a better title, accompanied with actual possession, is a breach of a covenant of quiet enjoyment in a deed executed after the possession commenced under that title; and the bargainee need not bring an ejectment, to entitle himself to recover.

the purpose of defeating his subsequent release. As between the parties then, the bargainee is, on strict principles, in; but if there be in reality an adverse possession, he can only be held to be in for an instant; for there will be no implication against the truth, further than is necessary to make the deed effectual for its purposes. If such adverse possession be upon title paramount, then there is an eviction of the bargainee *eo instanti* that the possession conferred by the statute takes place: for the eviction need not be by process. Upon general reasoning therefore, I conclude the case is for the plaintiff on this point. But there is a case in the Supreme Court of the United States directly in point. (*Duvall* v. *Craig*, 2 *Wheat.* 45.) This was also one of the questions decided in the famous case of *Ricketts* v. *Dickens* in this state. (1 *Murph.* 343.)

There can be no doubt but *Wingfield's* possession is co-extensive with his title, he being in the actual possession of part. He could have maintained trespass for an entry on the wood land. Whatever may be the rule for damages upon an eviction from a particular estate, after the expiration of a part, this case cannot form an exception to the general rule, because the whole interest was lost, and there was no enjoyment.

The last exception stated in the record is, that the action ought not to have been brought by the executor, but belongs to the heir. This is contrary to well settled law. The case of *Lucy* v. *Livingston*, (2 *Lev.* 26, and 1 *Ventris*, 175) established, that for a breach in the testator's time the executor and not the heir is to sue; because as no estate in the land descends to the heir, there is nothing in him, to which the covenant can attach itself; and the demand had become a personal thing in the testator, and so goes to the executor, who represents the the person. The case of *Kingdon* v. *Nottle*, *ubi supra*, has been cited to the contrary. It is to be observed, that it is directly opposed to the cases of *Hamilton* v. *Wilson*. (4 *Johns. Rep.* 72) and *Bennet* v. *Irwin*, (3 *Id.* 363.) But if it were not, it is distinguishable from the case at bar. This is an action on a covenant for quiet

Where the vendee is evicted in his life time, an action for this breach of the covenant of quiet enjoyment is properly bro't after his death, by his executor, and does not descend to the heir.

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possession, where there has been an eviction and the possession lost in the life-time of the bargainee. Every thing then was gone before either the heir or the executor could claim, except the right in one of them to recover damages—which right for the reasons given in *Lucy v. Livingston* comes to the personal representative. *Kingdon v. Nottle* was on covenants of seisin and of a right to convey. It is true, this is broken as soon as made, if the covenantor had no title; and for that reason it would seem that the executor ought to sue. And so I should think he certainly ought, if that be the only covenant in the deed, and there be a total defect of title, so that nothing passed under the deed. But if there be other covenants, as for example, for quiet possession, and some estate or interest did pass, it may make a difference. For the bargainee may choose to keep the estate, such as it is, and rely upon his title becoming good by matter subsequent, rather than treat his own title as defective, while he is enjoying under it. And where the ancestor has not himself elected to treat his title as bad, but on the contrary to depend on the other covenants, and to let it descend, or devise it as good, it would seem reasonable, that the executor should not be permitted to interfere with the claims of the heir or devisee, without showing a special damage to the personal estate. This is what I suppose *Lord Ellenborough* might have meant by saying, the declaration by the executor ought to show some special damage to the testator in his life-time. It then becomes a personal demand to the extent of that damage. But if the testator treats it as an estate in possession, and will not consider the breach of covenant as destructive of his estate, nor give the latter up for the damages which he might claim on the former, I do not see that the executor can exercise that power against the heir or devisee, or (for it would go thus far) even against an alienee. The executor ought not to make that personalty for his own benefit, which the testator disposed of as realty, unless there be no method, by which those who claim it in the latter character could obtain redress for the final loss of the estate. But here, in a case of covenant for quiet

possession, broken in the testator's time, the whole loss is then incurred, and there can be nothing but damages had: and they of course attach to the person.

Where the verdict exceeds the amount of damages laid in the writ, it is fatal in arrest of judgment, unless the plaintiff remit the excess.

Another objection is taken here, upon the matter appearing in the record. The damages are laid at $1500; and found in the verdict to be $2334. This is fatal in arrest of judgment, unless the plaintiff be allowed to remit the excess, or unless an amendment can be made by enlarging the sum in the declaration. The plaintiff does not offer to remit, but moves for leave to make the amendment. This motion is founded on the acts of 1824 (*Rev. c.* 1233,) and of 1790. (*Rev. c.* 318.) Certainly there is no other foundation for it; for under the English statutes of amendment it has always been held, that there must be something to amend by. But it is plain from the words of the act of 1790, that *any thing* may be amended *at any time*, introduced in the latter part of the section, after the enumeration of many particular instances in which amendments should be allowed, that the legislature intended amendments to be made in the most liberal manner possible. The expressions seem to have been used, in a spirit of impatience at the reluctance of the courts to allow amendments, and as was expressed by Chief-Justice TAYLOR, in *Grandy* v. *Sawyer* were designed, to overcome the remaining scruples of the courts. In the interpretation of the act there has been a latitude correspondent to its terms. Writs have been amended by striking out defendants; (*McClure* v. *Burton*, 1 *Law Repos.* 472;) and by striking out some plaintiffs, and inserting another. (*Grandy* v. *Sawyer*, 2 *Hawks* 61.) Declarations have been amended after a special demurrer; (*Davis* v. *Evans*, 1 *L. Repos.* 499,) besides other cases equally striking. In fine, the plaintiff has been permitted, not to *amend*, but to *change* his process, and make a new action. But this act is confined to amendments made in the court, in which the action is originally brought; and does not therefore enable a revising court to either disregard the defect, or make the amenndment. To remedy this, the act of 1824 was passed. And the enactment of this last law, after the

But by the acts of 1790 & 1824, (*Rev. c.* 318, & 1233,) the plaintiff may in this court amend his writ.

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adjudications on the former, is a legislative declaration of the enlarged construction both ought to receive. By it the Superior Court upon appeal, or writ of error, is authorized to make any amendments the County Court could; and the Supreme Court is likewise directed to make them in the same manner as they could have been made in either of those courts; and this "*from time to time*," and "*at any time, in any thing*." There is therefore no restraint upon this court but its own discretion, and such as grows necessarily out of the nature of its jurisdiction. The words are as broad they can be: but they must be construed in reference to the subject matter. The court is bound to make every amendment, which would be of course in the inferior court, and which does not involve the merits. But plainly the act does not contemplate any amendment to be ordered by this court to be made elsewhere; nor any to be made in this court, but such as may be necessary to support the judgment below, on a verdict on the merits. We cannot make an amendment then after judgment, which would leave it at large, whether the verdict was upon the merits of the case as amended; nor one which necessarily, or by the equity of the court would let in a new plea or replication. For that would not be an amendment in support of what had been done; but one on which the judgment rendered must be reversed, and the parties sent to a new trial. The object of the act, in reference to *this* court, is to avoid that. Upon an appeal in the Superior Court it is different; because the cause is there to be tried *de novo*, and the verdict in the County Court is annulled by the appeal. The whole merits are there open, and the Superior Court, from the nature of its functions, may amend any thing upon terms. The amendment now moved for does not require repleading, nor admit of it. It is not of a kind, which changes the merits as tried, but is made necessary by those merits as found. It hurts nobody but the plaintiff, who discharges the bail, and loses his costs thereby. There is no possibility of its doing an injury to the defendant, by making him pay more money than he owes, or sooner than he ought, namely, before it is

By the act of 1824, this court is bound to permit amendments which would be of course in the court below; but it is not authorized to direct them to be made in the court below, nor to make any but such as are necessary to support the judgment of the Superior Court.

None can be permitted here, which would affect the judgment below, or upon which ordinarily a new plea is admitted.

due. Why then send the parties to renew their litigation? The acts, in permitting us to avoid that necessity, forbid us from imposing it on the parties. And here I must qualify the expression, which dropt from me in *Dowell* v. *Vannoy*. (*ante* 43,) on this subject, when I was not aware of the very strong terms used by the legislature. Probably in that case, I mean a verdict defective only in form by the misprision of the clerk; and where the substance is intelligible, an amendment would be allowed here, as it would be of course in the Superior Court. I think for these reasons we are bound to amend here, as prayed for.

Notwithstanding the *dictum* in *Dowell* v. *Vannoy*, (*ante* 43,) verdicts which are defective in form, from the misprision of the clerk, will be corrected in this court, if the substance is intelligible.

The terms, I think, must be upon the payment of all the costs. The general rule is, that where the defect is not one that is cured by the statutes of *jeofail*, but which requires an actual amendment, the party who asks it must pay all the costs to that time; unless it be the fault of the officer, and not of the party. This is emphatically applicable to cases where the action is *changed*; in which the plaintiff by his own admission could make no recovery, and would be compelled to pay all the costs, if prosecuted to a final decision. It is equally applicable to a case, where there can be no judgment for debt or costs, unless the amendment be made—as here. The plaintiff gets more than he asked, and he must pay the expense, upon which the gain is founded. The rule is based on two grounds. The one, of duty to the particular party who is defendant, who has a right to ask that the plaintiff shall not enlarge or change his demand, without paying him his costs incurred in defending the former one: the other, of a duty to the profession and the country, which enjoins it on the court not to encourage ignorance or negligence, by giving them all the advantages of knowledge and diligence. The amendment is allowed therefore, upon the payment of all the costs, including those of this court; and upon the record as amended, the judgment is affirmed, except as to the costs.

Defects which require an actual amendment, and which are not cured by the statutes of *jeofail* can be amended only upon the payment of all costs. And where the am'nt of damages laid in the writ was increased, the amendment was permitted upon these terms, HENDERSON, C. J. *dissentiente.*

HENDERSON, Chief-Justice *dissentiente.*—I most fully concur with the court, that the amendment should be

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made—for it presents no new statement of *issuable facts*. Nor have I the least doubt, that this, a *substantial* amendment, falls under the meaning of the act of 1790. But I think, that the amendment should be made without giving the defendant costs. For I cannot consent to give that, which the defendant, cannot with a safe conscience, receive.

PER CURIAM.—JUDGMENT AFFIRMED.

MARY EURE *adm'r. of* JOHN TILLERY, *v.* ELISHA H. EURE.

When an executor sells the assets of his testator and takes a bond payable to himself, *as executor*, and dies leaving the bond uncollected, it was held, RUFFIN, J. *dissentiente*, in the absence of any evidence that the executor had appropriated the bond to his own use, that both at common law and under the act of 1794, (*Rev. c.* 415,) "to explain and supply the deficiencies of certain acts of Assembly respecting sales by executors and admintrators," the bond was of the assets of the testator, and an action on it might be brought by the administrator *de bonis non*.

This was an action of DEBT originally commenced by warrant upon a bond executed to *Stephen Eure*, as administrator of *John Tillery*, upon the sale of the personal property of the intestate. After the execution of the bond, *Stephen Eure* died intestate, and administration *de bonis non* upon the estate of *Tillery* was then committed to the plaintiff. Upon the trial before MANGUM, Judge, at Halifax, on the spring circuit of 1829, it was objected for the defendant, that the bond was not evidence of a debt due by the defendant to the plaintiff, as administratrix of *Tillery*, but was only evidence of a debt due *Stephen Eure* in his life-time; and that the action ought to have been brought by his administrator.

Upon this objection his Honor being of opinion with the defendant, nonsuited the plaintiff, who appealed.

Devereux, for the plaintiff, cited *Catherwood* v. *Chabaud*. (8 *Eng. C. L. Rep.* 45) and the act of 1794, (*Rev. ch.* 415).

No counsel appeared for the defendant.

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HENDERSON, Chief-Justice.—If we resort to authority, we shall find, that as soon as it was determined, that an executor or an administrator could receive a bill or note as executor or administrator, and could sue thereon in his representative character, that those decisions were immediately followed by others, declaring that if the bill or note was not collected by the executor or administrator, but was left uncollected at his death, the right to collect and sue on it devolved upon the representative of the first testator or intestate, as unadministered by the first representative. And were it not for a difference in the opinion of the court, I should think that there could not be a doubt upon the question. Because the reason why the executor or administrator could sue in his representative character, was that the bill or note was of the estate of his testator or intestate, yet to be administered. On no other principle, could the action by him in that character be sustained. If unadministered by the first representative, the administration of it devolved on the administrator *de bonis non*; or the executor of the executor, as the case might be; who thereby became the executor of the first testator. In the case of the administrator *de bonis non*, his commission or letters of administration direct and authorize him to *administer all the estate of the testator or intestate unadministered by A. B. the former executor or administrator*. And the law makes the same injunction to the executor of the executor, as to the unadministered estate of the first testator. When it was held for law, as it once was, that an executor or administrator could not receive a bill or note in his representative character, and of course could not sue on it in that character, it is not to be wondered at, that it was also held, that if he died, holding a note or bill, altho' professed to be received in that capacity, and for a debt due to his testator or intestate, upon his death, his executor or administrator only could sue upon it; and the representative of the first testator or intestate could not. Indeed it would have been wonderful if it had been

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held, that the representative of the first testator could have sued. For it would have presented a case, where the administrator *de bonis non* could sue as such, where the first administrator or executor could sue only in his private, and not in his representative character. It would be saying that the bill or note, in the hands of the first administrator or executor, was not of the estate of the testator or the intestate; but on the death of the executor or administrator, it became so. The doctrine can only be attacked in the bud, in the right of the executor or administrator to receive a bill or note, as executor or administrator. For if that is admitted, I think the other follows of course. In deciding this case, I have no interest to support or deny the modern doctrine of the English courts, that he can. Indeed it seems now to be universally admitted there ever since the case of *King* v. *Thom*, (1 *T. R.* 487,) that executors or administrators may receive bills or notes in ther official character. The doctrine has been gradually extending itself to other official acts. And in the case of *Catherwood* v. *Chabaud*, (8 *Eng. C. L.* 45,) where the assignment was to the administrator *generally*, not *as administrator*, yet being for a *debt due to the intestate*, the bill being uncollected by the administratrix in her life time, it was held, that it devolved on the administrator *de bonis non*, as assets of the estate of the first intestate, to be administered by him as unadministered by the first administratrix.

I said, I felt no interest in supporting the English decisions, that an executor or administrator, as such, might receive a bill or note, in order to support the opinion I have formed. For be that as it may in England, they can certainly in this state, take bills, bonds and notes in their representative character. The acts of our legislature direct executors and administrators to sell the estate of their testator or intestate *on a credit, to take bonds* with surety; that the money *when collected shall be assets*, and prescribe how judgments shall be entered against them before collection. Argument is useless, I think, to prove, that they hold the evidences of these debts in their official, and not in their individual character. The

money due on the sales is not assets, until collected. They may therefore sue on these bonds, as executors or administrators, for they are of the estate of their testator or intestate unadministered. If they can, and should die before they do, the administrator *de bonis non* certainly can and must. They devolve on him as unadministerered assets of the first testator or intestate. It is said, that inconveniences will result from giving this right to the administrator *de bonis non* to sue: as that the first executor or administrator will lose his right to retain for his own debt; and his opportunity of reimbursing himself for advances. Not so. He has nothing to do, but by some overt act, to make an appropriation, and the debt is his. It is administered. This, however, is not a contest between the two representatives; but the debtor sets up this defence against the administrator *de bonis non*. Besides, we find this bond in the hands of the administrator *de bonis non;* and we must presume, it came rightfully there. But if the law is settled, inconveniences cannot alter it. They can only be thrown in, in doubtful cases, to show how the law is, and I think, from our acts of Assembly, were it not for the difference of opinion, that this is not one of those doubtful cases, where inconveniences should have any weight. But I think the inconveniences are the other way. If this be as contended for, that is, the first administrator's own debt, (and they who hold that the administrator *de bonis non* cannot sue, affirm it,) if the defendant, the purchaser at the sale, have a debt against the first administrator, he may set it off; and thus make the administrator, who may be an insolvent, act unjustly against his will. For nothing can prevent such debt being a set off, if the note be the first administrator's. They are due then in the same right, that is, both individually. They are therefore *mutual*. Thus the whole property may be swept away, by the creditors of the administrator purchasing up the property at the executor's or administrator's sale, and setting off their debts against the executor or administrator. A further inconvenience will follow. The administrator *de bonis non* must stand by, and wait the

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pleasure of the representative of the first administrator or executor in the collection of the debts, and his further pleasure in paying them over to him, after he has collected them; when it might be done at once, by authorizing the administrator *de bonis non* to collect them.

As to the objection, that it does not appear, that *Tillery* was the first administrator, the bond shows it, as to this defendant. But if it did not, the letters *de bonis non*, of which the court had a *profert*, do. They are to administer all the goods, not administered by *Tillery*, the former administrator. I have taken it for granted, that this is a bond taken at a sale of the assets.

HALL, Judge.—It was held in *Jenkins* v. *Plombe*, (6 *Mod.* 181) that where an executor sued *as such*, but might have sued in his own name, he was liable for costs. (*Sayer's Law of Costs. Atkey* v. *Heard*, *Cro. Car.* 219). And that was the reason given, why counts in such an action, could not be joined with counts in an action, where an executor could sue only as executor; because it was said he was liable for costs in the first case, but not in the latter, (*Rogers* v. *Cooke*, 1 *Salk.* 10. *S. C.* 1 *Show.* 366.) and because the costs were entire and could not be severed. (*Betts* v. *Michell* 10 *Mod.* 316). The objection therefore would not lie against either suit, when brought singly, although in the name of the executor.

In other cases however, the validity of this objection seems to be impaired; for in *Bull* v. *Palmer*, (2 *Lev.* 165,) the plaintiff charged, that the defendant covenanted with him as executor, and was nonsuited. It was held, that as the action was brought in right of his executorship, and the money if recovered would be assets, he should not pay costs. (*Portman* v. *Came*, *Str.* 682. *Peacock* v. *Steere*, *Cro. Car.* 29. *Mason* v. *Jackson*, 3 *Lev.* 60).

In another and a later case, the question was, not concerning costs, but whether executors, to whom a bill of exchange had been endorsed, could sue upon it as executors. It was held that they could, because, amongst the reasons, it was said that the money, when recovered, would be considered as assets. (*King* v. *Thom*, 1 *Term* 487).

In a still later case, in an action of trover by an executrix for a conversion in the testator's life-time, and also for a trover and conversion after his death, on a nonsuit it was held, that the plaintiff was not liable for costs. And *Buller* stated, that whether the conversion was before or after, if the goods when recovered, would be assets in the hands of the executrix, she must sue for them in her representative character. (*King* v. *St. Mary*, 4 *Term* 477).

It was said in *Cowell* v. *Watts*, (6 *East* 405) that the correct and rational rule is, that counts may be joined, in which the money, if recovered, will be assets.—(*Petrie* v. *Hannay*, 3 *Term* 659).

In the late case of *Catherwood* v. *Chabaud*, (8 *Eng. C. L.* 45) it was held, that where a bill of exchange was endorsed generally, but delivered to *S. C.* as administratrix for a debt due to the intestate, and *S. C.* died intestate after the bill became due, and before it was paid, the administrator *de bonis non* could sue upon the bill. The money, in case it had been received by *S. C.* upon the bill of exchange, would have been assets of the estate of the intestate. As it was not received, the plaintiffs, the administrators *de bonis non*, had a right to sue for it.

This last case seems to be decisive of the one before the court. The note in question was given to *Stephen Eure*, as administrator of *John Tillery*. When *Stephen Eure* died, and letters of administration were granted to the plaintiff, she had a right to institute the present action, according to the principles laid down in the foregoing authorities. Whether the debt was recovered by *Stephen Eure*, the former administrator, or by the present plaintiff, the administratrix *de bonis non*, it is assets of the estate of *John Tillery*. I therefore think, the nonsuit should be set aside and a new trial granted.

RUFFIN, Judge, *dissentiente*.—It seems to me, that a reversal of this judgment is *quieta movere*. Nothing, I thought, was better settled in the law of this state, than that a bond, taken by an administrator, for property of his intestate sold by the administrator, belonged to the

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administrator. The opinion now entertained by the other members of the court has led me seriously to reconsider my own. It has not resulted in any change.

The old law was certainly in conformity to the opinion of the court below. An executor could declare in his representative capacity, only for matters arising in the testator's time. The executor's own acts were all personal to himself, and were declared on in his own right. Upon his death, there was no privity between him and the administrator *de bonis non*. I admit, that changes to a certain extent have gradually taken place in England; which, after producing no little confusion in the law of administration, have resulted in the modern case of *Cutherwood* v. *Chabaud*, the reasoning in which is nearly in point with the case before us. I not only entertain profound respect for those adjudications, as the opinions of eminent and learned men, but I acknowledge them to be authoritative, as determining what the common law is. Nevertheless I cannot allow so much authority to a single judgment of a single court, as to suffer it to overrule a multitude of the decisions of their predecessors, and the uniform course of our own. Innumerable cases have occurred, in which this question has arisen. Yet I have not heard of a solitary instance, in which the law has not been expounded as by the judge below. I have myself had it ruled on me, and ruled it so repeatedly, on the circuit. I am well satisfied, that those decisions were right.

It is of the utmost importance, that the course of administration should be certain; that no rule should be countenanced, which will disturb the order of paying debts, or embarrass the right of set-off; or impair the right of retainer in the first administrator, or his claim to indemnity for advances for the estate. I think all these consequences will follow the change now made.

It is said, that the principle of the modern cases is, that an executor may declare on a promise to him, *as such*, if the debt, when recovered, will be assets. I will not deny that. But if a new bond be taken by the executor for an old debt, due to the testator himself, it is a change

of the debt, which makes it assets immediately. Why? Because upon his death, the new bond will not survive to the administrator *cum testamento annexo*. This is the very reason given in the old books. Such a bond is declared on in the *debet* and *detinet*, and goes to the executor's own administrator. But here the bond was taken for property sold. *That* was assets as soon as it came to hand; and if the executor sell it, it does not cease to be assets. Whether the price be recovered or not, the value of the property is assets. Suppose a conversion or detention of it. Certainly the executor sues upon his own possession, and declares in his own right. He does not make a *profert* of his letters; but gives them in evidence, as a link in his title. The reason is, that before recovery the property is assets; and since the executor is chargeable the property is *his*. I am not speaking of a mere constructive possession by the executor; as where the trover was in the testator's time, and the conversion in the executor's. In such a case, he may declare as executor, because the whole matter did not arise in his own time. But where he has had actual possession, it is clear that he declares in *proprio jure*. Then the property is changed, and becomes his. Is it not strange, that the property is assets and the price should not be? And upon a bond taken for it, debt in the *detinet* will not lie. (*Hosier* v. *Ld. Arendel*, 3 *Bos. & Pul.* 7). For it cannot be alleged, that the obligor *owed* to the *testator*, and detains from the executor.

The English cases, allowing counts upon promises to the testator and to the executor, *as such*, to be joined, had their origin in a necessity under which the courts felt themselves to permit that mode of declaring, for the sake of avoiding the statute of limitations. They first held, that if the promise was laid to be made to the testator and the statute was pleaded, evidence of a promise to the executor was not admissible to take it out; because that was a different contract. Why a different contract, if it relate to the same subject, and the debt due upon each promise is to be assets, only when recovered? Yet the courts of Westminster did not say until a late day,

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if it be yet definitively said, whether the recovery is to be on the old promise as being revived by the new one, or upon the latter. *Lord Mansfield* indeed tells us, that the statute goes to the action only, and not the cause of action. The reports of *Burrow*, *Cowper* and *Douglas* are full of such expressions, as that the *remedy* and not the right is barred. In our own day, the question has been more minutely discussed, and an attempt made to follow the rule, that an executor might so declare, by another, that this new promise is the ground of the action and the old debt but the consideration. On this I must remark, that this court has said nothing yet. Though pressed to it in *the Bank of Newbern* v. *Sneed*, (3 *Hawks* 500) it was declined; and what was dropped, leaned the other way. But let the rule prevail, to the extent of the necessity which caused it. I cannot carry it further so as to overturn other well settled principles, and the rights of third persons.

The statutes of set-off are amongst the most valuable we have. They save expense, and in the true spirit of equity, hold the balance due on dealings between parties to be the real debt. The debts to be set off must be mutual, and due in the same right. If an action be brought on a debt due the testator, a debt due from the testator may be set off. But if the debt arise in the executor's time, the debt of the testator cannot be set off. Why? Because it would disturb the order of administration. Specialty creditors, for example, are to be paid before those by simple contract. Yet if a sale of property by the executor create a debt from the purchaser to him *as executor*, a simple contract creditor by buying at the sale will defeat specialties by setting off the debt from the testator. If it be said, that the executor can avoid this, by suing in the *debet* and *detinet*; I answer, that fails, when the bond comes, upon the death of the executor, to the administrator of the testator: for he is obliged to declare in the *detinet* only, and *as* administrator. It cannot be said that the set-off is to be allowed or not, as it shall appear that there are creditors of higher dignity; for that would involve an account of

estate upon every issue of set-off. I do not suppose, that it is meant that the right of set-off shall be at the mercy of the executor. Yet I cannot tell how it is to be exercised hereafter. If the executor discovers, that the debtor has a demand upon the testator, then he will sue in his own right, and by the form of declaring, preclude the set-off. If the debt be one of the executor's own, then he declares as executor, and the issue is alike unfavorable to the defendant. If the executor is himself to be compelled, without reference to his mode of declaring, to admit as a set-off, against a debt contracted with himself, his own debt, why is that right of his creditor to be defeated by his death; as it will be, when the bond passes to the administrator *cum testamento annexo*? The rights of the debtor ought not to be altered on one and the same contract, when sued by one or another person. It ought to be certain, what debt is the legal set-off, and not varied by the will of the plaintiff. I have not cited authorities to these points; because I have chosen, as illustrations, positions the most elementary and familiar. But the general doctrine of set-off is explicitly laid down in the cases of *Shipman* v. *Thompson*, (*Willes* 103) and *Tegetmeyer* v. *Lumley*. (*Id.* 261 *n*). These considerations do not seem to have been adverted to by the judges who decided *Catherwood* v. *Chabaud*. They seem to me to be important; and I suspect a case of set-off will be found very perplexing to that court, when it shall arise. One difficulty seems to have pressed itself on the notice of *Mr. Justice Best*, who gave his opinion last. The thought occurred to him, how he would have treated the action, had it been brought by the administrator of the administratrix. He does not dispose of it, otherwise than by remarking, that "it was unnecessary to decide whether he could sue; for that it was sufficient to say, that the administrator *de bonis non* might." He is pleased to add, that "this observation will reconcile the cases." With great deference, I do not see any harmony in that argument. It seems rather to increase the discord. For I am at a loss for a principle, upon which two different persons, in distinct rights, can have the power

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to sue on the same contract, for the same sum, at one and the same time. The right existing in one must, *ex necessitate*, exclude the other. I can hardly suppose, that if the administrator of the administratrix had been plaintiff then, he would have been turned out of court. If not, the other ought. *Chief Justice Abbot*, struck with the new view of *Justice Best*, takes up the case again, and remarks that there is much weight in the distinction. But he immediately admits, that "there may be cases, where the administrator of the administrator might and *ought* to sue, viz. if the first administrator had made himself *debtor* to the intestate's estate, for the amount of a bill received in payment of a debt due to that estate." Does not this give up the argument? There is no principle, on which the administrator can make himself debtor to the estate by taking a bill, but that by changing the original debt, he makes it present assets—a *debt* not being assets, until collected or altered, or the lapse of a reasonable time for collection. When thus extinguished, it is assets chargeable to the executor, and therefore whatever he receives in satisfaction of it, whether a bill, the purchaser's bond or a specific thing, is the administrator's own. But specific chattels, once in the executor's hands, are assets *eo instanti*, whether sold or retained by him—that is to say, at the common law.

This brings me to another branch of the subject not less important. The Chief-Justice puts an instance of an administrator becoming debtor to the estate; in which he admits the security ought to belong to the administrator. The reason is much stronger, when we consider him a *creditor* of his intestate or of the estate, by advances for it. Is he to lose his right of *retainer*? This must be, if the right to the bond survive to the administrator *de bonis non*. I had thought before, that the right to retain changed the property of the assets as soon as they came to hand. (*Muse* v. *Sawyer*, *N. C. T. R.* 204. *Merchant* v. *Driver*. 1 *Saund.* 307). It is said however, that suffering the administrator *de bonis non* to sue is most convenient and accords more with justice, because it brings the intestate's estate, more directly and speed-

ily, to be answerable to demands of creditors and next of kin. It is plain, that the circuity will be greater on the one side or the other, as the first administrator *happens* to be a debtor or a creditor of the estate. I admit, that the executor of the first administrator holds the proceeds of the bond, in trust for the estate of the first intestate. But when he accounts as trustee, the estate of the first administrator is fully protected not only by a retainer, but by all fair allowances for advances. This is manifestly just. And I cannot assent to any rule, which inverts the natural order of things, and that to the detriment of plain right. This view is also taken in a modern English case—that of *Hosier* v. *Arendel*, before mentioned. And that is grounded on *Betts* v. *Mitchell*. (10 *Mod.* 315). In the former it was expressly held (in 1802, and though reference was made to the new fashion of declaring,) that an executor could not join a count on a bond to his testator, with one on a bond to himself as executor. In *Catherwood* v. *Chabaud*, this case is not noticed, although *Lord Alvanley* expressly declares, that if a bond be given to an administrator, and he happen to die before the debt be recovered, "*it cannot be contended*, that the administrator *de bonis non* can put it in suit." He says it could not be allowed, as it might affect the right to retain. And *Chambre*, Justice, says, the debt created by a bond to an administrator is a debt *to him*, and will devolve on *his* representative. This case is precisely in point. *Catherwood* v. *Chabaud* may indeed be distinguished from it, in what likewise will distinguish it from the case before us. It was an action of *assumpsit* on a bill of exchange, passed to the administrator *as such*, for a previous debt to the intestate. Now there is a latitude of declaring in that action, not allowable in debt. And since the case of *Bickerdike* v. *Bollman*, (1 *T. R.* 405) it has been the common understanding, that a bill received for a previous debt does not extinguish it. If the bill be not good, an action will lie on the original debt, and the bill is only collateral security. The *debt* therefore might survive to the administrator *de bonis non*, and draw after

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it the bill. But here there was no debt to the intestate. It was contracted with the administrator himself, and *he* could not declare in the *detinet*, but only in the *debet* and *detinet*. For no action but debt will lie on a *bond*, and there is a prescribed form for that, which ties the court down. The truth is, there is no *privity* between a first and second administrator; and the law does not transfer contracts made with the one to the other. Let us consider the case of a judgment obtained by the administrator, even for a debt due to the intestate. Upon his death, it is well known, that at common law, the administrator *de bonis non* could not enforce it, but was remitted to the original cause of action. Much less could he interfere with a judgment, rendered on a bond given to the administrator himself. As to the first, we have now a remedy in the act of 1824. But why was a statute necessary, if the mere volition of judges was adequate to change the law. The act is confined to judgments in favor of the administrator, in his representative character. How can we extend it to contracts *in pais*, entered into by the administrator himself? If the bond had ripened into judgment before the act of 1824, it is plain that the administrator of the administrator alone could have sued on it. I cannot perceive any power in us to say, that any body else can sue on the bond itself.

I apprehend the act of 1794, (*Rev. c.* 415,) has no bearing on the question. That does not mean to change the executor's rights, or those of creditors, or the law of set-off. It only means to say, when execution shall issue against the executor. If however it embraced the whole case, it would not affect the present question; because the bond fell due in January 1827, and *Stephen Eure* himself received part payment in February 1828. He lived long enough to make the bond his own; for if he does not use all lawful means to recover the money, he is chargeable with it by the letter of the act.

I know not how far the reasons, upon which the judgment is reversed, will carry us in other cases. But if this plaintiff can recover, upon the ground that the bond, payable to *S. Eure*, the administrator of *J. T.* is, in ef-

fect, a bond *to the estate*, I cannot see why a bond given to a guardian may not be sued on by the succeeding guardian, or by the ward in his own name; or why upon the removal of a guardian, or death of an administrator, these bonds may not be recovered in *trover*, by the ward or by an administrator *de bonis non*. I do not deny, that the guardian or administrator is chargeable for the amount of the bonds payable to him, as part of the estate. But that is in another court, and upon the ground of a trust. That very proceeding admits the legal title to be in him, to whom the bond is payable. But here the question is, whether a *bond*, payable to one man, can be sued on by another, who is not the assignee nor administrator of the obligee. If it can, I do not see, why every bond, payable to one, with a trust expressed on its face for another, is not a bond in law to the *cestui que trust*. I have examined this subject thus minutely, because I consider it one of much practical consequence: I hope I am mistaken in my views of the law, and in my apprehension of evil results; but under my present impressions, I must say, that I think the judgment ought to be affirmed.

PER CURIAM.—JUDGMENT REVERSED.

SUSAN A. MCCULLEN *et al.* v. BRITTAIN HOOD.

A receipt, acknowleging the payment of a particular sum, without stating it to be in full, is not in itself sufficient evidence to support the plea of accord and satisfaction.

TRESPASS QUARE CLAUSUM FREGIT, tried on the last circuit, at Wayne, before his Honor Judge DONNELL.

Plea—*accord* and *satisfaction*, upon which the case was, that the plaintiffs were the heirs, and the defendant the administrator of *Asher McCullen*; that the defendant entered upon the lands which descended to the plaintiffs, and rented them out for two years; that afterwards the defendant handed to the guardian of the plaintiffs several notes, and took from him the following acknowledgement:

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"Received of *Brittain Hood*, as next friend to the heirs "of *Asher McCullen*, deceased, the following notes of "hand, for rent of lands, &c. viz: &c." No other evidence was offered.

It was contended for the plaintiffs, that a guardian could not make an accord and receive satisfaction for a claim of his ward; and if he could, that the receipt was not evidence of an accord and satisfaction of the whole demand, so as to defeat the action, if in truth they were entitled to a greater amount of damages than that stated in the receipt.

His Honor instructed the jury, that a guardian might, acting *bona fide*, make an accord and receive satisfaction for an injury to the estate of his ward, so as to defeat his action; and left it with the jury to determine, whether the notes were received as an accord and satisfaction, or as a discharge *pro tanto* of the damages.

The jury returned a verdict for the plaintiff, allowing the amount of the notes as a part satisfaction, and assessed damages for the residue, and the defendant appealed.

W. C. Stanly, for the defendant.

Gaston, J. H. Bryan and *Mordecai, contra.*

Henderson, Chief-Justice.—The plaintiff does not, and the defendant *cannot* bring into review the law, as laid down by the presiding judge, as to the power of the guardian to make an accord, and receive satisfaction for the entry, and occupation by renting out the lands of his wards. Nor does the case require, that we should examine the question. For we are of opinion, that the evidence offered by the defendant is not even *prima facie* evidence of that fact. The only evidence offered in support of that plea was the receipt. And that shows only, that certain bonds were received, by the guardian, of the defendant as next friend to the infants for rent. If it had been expressed in full of the rents received by him, or that they were all the bonds received by him for rent, or all that he had rented the lands for, an inference might be drawn, that the guardian received them in *full satisfaction*. But no such expression is found in the receipt.

Nor was any evidence offered of all or any of these facts. There might be more bonds or money, and yet the receipt speak the truth. We therefore think, the defendant has no reason to complain of the charge of the judge. He neither showed, that they were all the bonds he received, or that they were for the full value, on which to found a presumption, that the guardian received them in full satisfaction. Nor does the guardian say so in the receipt.

PER CURIAM.—JUDGMENT REVERSED.

KINCHEN NORFLEET v. JOSEPH RIDDICK, *Ex'r. of* THOMAS RIDDICK.

An administrator who holds property of the intestate, under a conveyance fraudulent and void against creditors, is liable to them as an executor *de son tort*.

This was an action of ASSUMPSIT, tried before MARTIN, Judge, at Gates, on the last circuit. The question arose upon the plea of *ne unques executor*. The facts were, that *Thomas Riddick* died intestate, and letters of administration on his estate issued to the defendant, before the commencement of this action. That the defendant claimed title to two slaves under a pretended sale, fraudulent against the plaintiff, and that he had been in possession of them before and since the death of *Thomas*, claiming them as his own.

His Honor, thinking the action could not be sustained upon these facts, nonsuited the plaintiff who appealed.

Iredell, for the plaintiff, cited *Stubbs* v. *Rightwise*. (*Cro. E.* 102.)

Kinney, contra.

One who intermeddles with the goods of a decedent may be subjected as executor *de son tort*, altho' letters of adminis-

HENDERSON, Chief-Justice.—Were this a case, where the defendant had made himself liable to actions as executor of his own wrong, by intermeddling with the goods of the dead man, for which he would have been subject to the rightful administrator when appointed, he does not by afterwards obtaining administration, purge the wrong

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he committed before its grant, so as to prevent his being sued as executor. The administration purges the wrong so as to confer on him the rights of a lawful administrator, and to enable him to retain. But he is still liable to creditors, if they elect to consider him an executor, and whether he or another administers the assets, the principle is the same. If this was not the rule in cases where the wrongdoer is liable to the rightful administrator, yet in the present case, it must be so, *from necessity*. The wrongful act complained of, is the taking by the defendant and holding in his possession, under a fraudulent conveyance from a dead man, two negro slaves. For this act he is not responsible, either to an executor or an administrator. The conveyance bound the dead man, and it binds them also. But it does not bind the dead man's creditors. It is void as to them. The law has therefore wisely provided, that he who takes, or has in his possession, under a fraudulent conveyance from the dead man, any of his goods, becomes thereby an executor of his own wrong. This is the case, whether there be an executor or not; and whether the taking be before or after administration granted, contrary to the rule in cases of mere intermeddling. For the general rule is, that where there is an executor, or after administration granted, an intermmeddling with the goods of the deceased will not make one an executor of his own wrong, because the trespasser shall answer to the executor or administrator, and not to creditors. And it is because he is answerable to the executor or administrator for those acts, that he is not answerable to creditors. The reason and policy of the rule are obvious. But even where there is an executor or administrator, and the acts are of that nature, that they cannot obtain satisfaction for them, as in the present case, the fraudulent grantee, being a privileged intermeddler, shall be liable to creditors, as executor *de son tort*. The law would be inconsistent with itself, if after giving the right to creditors, it afforded no remedy to them. Upon either principle therefore, this action can be sustained.

tration afterw'ds issue. If the administration is committed to him, it entitles him to retain.

But an intermeddling after a grant of administration, does not make an executor *de son tort*, because he is answerable to the administrator.

If the intermeddler claims under a grant valid as to the administrator, but void as to creditors, the latter may from necessity subject him as an executor *de son tort*.

PER CURIAM.—JUDGMENT REVERSED.

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WILLOUGHBY D. BARNARD v. ARTHUR GREGORY *Ex'r. of* JONATHAN ROBERTS.

One who sets up a claim to goods of an intestate, under a fraudulent conveyance, and thereby injures the sale of them, does not render himself an executor *de son tort*.

DEBT upon a single bond; and on the trial before his Honor Judge MARTIN, at Camden, on the last circuit, the only question was upon the plea of *ne unques executor*. To make the defendant an executor of his own wrong, the plaintiff proved that the sheriff having an execution, the *teste* of which overreached the death of *Roberts*, levied it upon a negro in his possession at his death; that the defendant at the sale produced an unregistered bill of sale for the same negro and claimed title; that the slave, in consequence of this claim, went at a small price, and that the defendant paid the purchaser an advance upon his bid, and took a bill of sale from the sheriff to himself. The plaintiff then offered evidence, tending to prove that the defendant's bill of sale from *Roberts* was fraudulent and contended in that case, that the defendant by forbidding the sale, and causing the negro to sell for less than its value, had made himself an executor of his own wrong. But his Honor being of a different opinion, directed the jury to find for the defendant, and the plaintiff appealed.

Kinney, for the plaintiff.

Iredell, for the defendant.

HALL, Judge.—An executor of his own wrong is defined to be a person, who without any authority intermeddles with the estate of the deceased, and does such acts as properly belong to the office of an executor or administrator. (*Went Off. of Ex.* 171). And by *stat.* 43 *Eliz. ch.* 8, he is declared to be an executor of his own wrong, who holds any goods of, or who owes any debt to the intestate, for which he holds a fraudulent release or discharge, and without such valuable consideration as shall amount to the value of the same goods or debts or thereabouts.

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But I am not aware that it has ever been adjudged, that a person was an executor of his own wrong, who has not intermeddled with the estate of the deceased, or who does not hold any of his estate in his hands, but who only sets up a claim against the estate, although that claim may not be a valid, but in truth a fraudulent one. This may have been the defendant's case, but it has not been proved. It is not stated, although probably the fact was so, that *Roberts'* estate was insolvent. Nor has it been made to appear, that the defendant's unregistered bill of sale was fraudulent. To be sure it appears that he had not all confidence in it, when he purchased the title of the person who bid off the negro. Be that as it may, I think the judge did not err when he decided, that although the bill of sale was fraudulent, and although the defendant forbid the sale, claiming under it, and thereby caused the property to sell for a less price, yet that did not constitute him an executor of his own wrong.

PER CURIAM.—JUDGMENT AFFIRMED.

URIAS COLLINS v. MARTIN NALL.

Where an opportunity of appealing has been lost by the neglect of an officer of the law, the contrivance of the opposite party, or improper conduct in the inferior court, a *certiorari* will be granted without reference to the merits.

The cases of *Chambers* v. *Smith*, (1 *Hay.* 366,) *McMillan* v. *Smith*, (2 *Law. Rep.* 75,) *Davis* v. *Marshall*, (2 *Hawks* 59,) *State* v. *Williams*, (2 *Hawks* 100,) and *Estes* v. *Hairston*, (*ante*, 1 *Vol.* 354,) approved by RUFFIN, Judge.

Seawell, for the plaintiff, had obtained a *certiorari* upon an affidavit in which the plaintiff swore, that a petition was filed by him in the county of Wake against the defendant, under the act of 1809, (*Rev. ch.* 773) "directing how persons injured by the erection of public mills shall in future proceed to recover damages"—that upon the trial a verdict was taken, subject to the opinion of the court upon a question touching the title of the land in the

petition mentioned—that thinking the point abandoned by the defendant he went home; but towards the end of the term, accidentally hearing that the point had been determined against him, he came to Raleigh, and found a judgment had been entered for the defendant from which he prayed an appeal—but that he was not then able, after great exertions, to give surety; and on account of the late period at which this happened, there was not sufficient time to return home, and procure his neighbors to join him in a bond, before the expiration of the term.

The plaintiff filed with his petition a copy of the record of the cause in the court below, which contained a statement of the facts upon which the verdict was set aside, and judgment entered for the defendant.

W. H. Haywood moved to dismiss the writ upon the affidavit of the defendant, stating that the cause was tried on Wednesday of the term; that final judgment was pronounced on Friday morning; that on Saturday morning, the plaintiff came into court and prayed an appeal, and time to get his sureties; that the judge informed him the court should be kept open until midnight to enable him to give his bond and surety; that the judge then handed to the defendant's counsel a statement of the facts, on which the verdict was set aside, and directed it to be filed in case the appeal was taken.

RUFFIN, Judge.—I think the motion to dismiss the *certiorari* must be overruled. It is true, that writ is an extraordinary remedy, and is grantable, in my opinion, in the discretion of the court. It is not a matter of right as an appeal or a writ of error is. But in allowing it as a substitute for an appeal, the courts have always exercised their discretion very liberally. And in cases, where the party has lost his appeal, by the neglect of an officer of the law, the contrivance of the opposite party, or the improper conduct of the inferior court, the cause will be examined upon *certiorari* without reference to the merits. This is upon the ground, that the party has been deprived of a right—to appeal—without his fault. (*Cham-*

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bers v. *Smith*, 1 *Hay.* 366). Where indeed he loses his appeal by his own neglect or that of his agent, as if he does not pray an appeal when he could, and had reasonable time, nor bring up his appeal after obtaining it, he is not helped; because he had an obvious and regular relief, which it was his own folly to abandon. (*McMillan* v. *Smith*, 2 *Law Rep.* 75. *Davis* v. *Marshall*, 2 *Hawks* 59. *State* v. *Williams*, 2 *Hawks* 100). The present is not like either of the foregoing cases—for there were no omissions nor surprize by the party or the court.

If an appeal be lost by the neglect of the applicant or of his agent, a *certiorari* will not be granted.

But there is another class of cases within which it does fall; that of accidental inability to give security for the appeal; which is the party's misfortune, and not his fault. It is admitted, that he intended to appeal, and prayed for it: for the point reserved was drawn out by the court, and the plaintiff's exception to the opinion given on it. The defendant states, that this was on Friday morning: and that the court was kept open for the purpose of allowing the appeal, until the term expired on Saturday night. This was all the court could do. But the plaintiff swears, that he came to court on Saturday morning, and then first heard of the decision: that he prayed an appeal, the judge stated the case, and that he made every effort to procure sureties, but could not. This the defendant does not profess to deny in his affidavit. In such a case, it has always been the course to grant a *certiorari*, where it was not, apparently, merely for delay, or for the vexatious purpose of avoiding a decision made on the merits. If the case is a fair one for discussion, a rehearing ought not to be precluded by an inability to give security at the moment. I do not suppose indeed, that it would be granted, if it appeared that it would or might be used unfairly, without laying the party under terms not so to use it, or to take advantage of a mere slip or informality, without regard to the merits. This would be an abuse of a discretionary writ, by one who has been deprived by another of no right, but who gets it by asking it as a favor. The case before us furnishes an example, illustrative of my meaning. The record, which the plaintiff exhibited with his petition,

It is otherwise where it is lost by the accidental inability of the applicant to give security for the appeal.

But in such case it is not granted, when applied for merely to delay the other party, or to avoid a decision on the merits.

And the applicant will also be laid under terms not to avail himself of a technical advantage, arising from a mere informality

contains a verdict in favor of the plaintiff, subject to the opinion of the court on a point reserved; but did not state the point, nor the facts on which it arose; and on this, a judgment for the defendant. Now this was a plain error, for which there would necessarily be a reversal. In such a case, I should think it proper to lay the party under a rule to amend the verdict, by inserting the case then stated, or now to be stated by the judge. In this case, the parties have rendered this unnecessary, by inserting the matter reserved by consent, in the record returned with the *certiorari* by the clerk of the Superior Court. Upon the inspection of the record, it appears that the cause was brought here not to stifle the merits; not to delay a final decision vexatiously; not entirely without merits; but upon an exception to the opinion of the court upon the validity of the plaintiff's title to the land alleged to be damaged. The point is one which enters into the *gist* of the dispute; and the exception is a fair one to an opinion of very general consequence, and to say the least of it, the correctness of which is very doubtful.

Writs of *certiorari* have often been granted upon the circuit, on the ground of real inability to obtain an appeal. *Estes* v. *Hairston*, (*ante* 1 *vol.* 354) is an instance in this court. I take it for granted, when the party swears to his inability, and that it is not contested in the opposing affidavits, it is true. For there is in general no inducement to refrain from appealing, after excepting and praying it, but inability; because security must be given before he can have a *certiorari*; and because it is not so advantageous as an appeal, upon which he can be laid under no terms.

I think therefore the cause must be put on the docket, to be decided on the matter of the exception.

PER CURIAM.—MOTION OVERRULED.

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CHARLES HATCHER v. JOHN MCMORINE.

Where A and B were indorsers of a bill drawn for the accommodation of C, and A being the first indorser paid it, and afterwards received the note of C, indorsed by B, for one half the amount, it was held, that this note was not given for the accommodation of A, and that he might recover on B's indorsement.

The case of *Daniel* v. *McRae*, (2 *Hawks* 590,) approved by HENDERSON, Chief-Justice.

This was an action of DEBT, brought upon the defendant's indorsement of a single bond made by *Asa* and *Isaiah Rogerson*, for $500, payable to the defendant; and on *nil debet* pleaded, the cause was tried before MARTIN, Judge, at Pasquotank, on the last circuit, when the case was, that *Asa Rogerson* had drawn a bill upon *Garrison* and *Ford*, of Norfolk, for $1000, payable to the plaintiff who indorsed it to the defendant, by whom it was indorsed to the office of the Bank of the United States at Norfolk. At its maturity this bill was protested, and the drawer and acceptor having become insolvent, the plaintiff took it up. One witness stated, that the bond which the defendant had indorsed, and on which the suit was brought, was executed for the benefit and accommodation of the plaintiff, to enable him to receive its amount from the bank, and when received it was to be applied to the payment of one half of the bill of exchange; and a letter of the plaintiff was produced by the defendant, in which he said, "I have paid an indorsement of yours for $1000, "I have agreed to waive it for half, $500, at sixty days "for *Asa Rogerson's* note, with your indorsement."

His Honor charged the jury, that the plaintiff as the first indorser of the bill was liable for the whole amount of it, and if the bond in question was made and indorsed for his accommodation in order to raise funds for its payment, he could not recover on the indorsement.

A verdict was returned for the defendant, and the plaintiff appealed.

Hogg, for the plaintiff.

Kinney, contra.

Henderson, Chief-Justice.—This case may be determined without the aid of the principle established in the case of *Daniel* v. *McRae*, (2 *Hawks* 390,) to-wit: that in bills or notes for the accommodation of the drawer or maker, prior and posterior indorsers stand in equal degree as co-sureties, without any express contract to that effect, if at the time of their respective indorsements they knew that it was accommodation paper, for the benefit of the drawer or maker, and that nothing was paid for or upon the indorsement. For this case states, that *Rogerson*, the maker of the note, had before that time drawn a bill on *Garrison* and *Ford*, for $1000, in favor of *Hatcher*, which they had accepted, and which *Hatcher* had indorsed to *McMorine*, and *McMorine* to another; and finally it was discounted at bank. That the drawer and exceptors became insolvent, and that *Hatcher*, the first indorser, *paid the bill*. If this was a real transaction, *Hatcher* had a right to call on *Rogerson* for the $1000. And if the note now in suit was drawn by *Rogerson*, although it might have been indorsed by *McMorine* solely for *Rogerson's* benefit, *McMorine* is bound to *Hatcher*. Because *Rogerson* whom he authorized to receive value for it, has in fact received it, as he paid it to *Hatcher* in part discharge of the money, which the latter had paid on the bill. *Rogerson's* receipt of value for the note is *McMorine's* receipt of value, because *Rogerson* received it by his authority. This is our daily experience with the banks upon accommodation paper. Therefore, in the absence of all proof on the subject, except that *Hatcher* paid the $1000 on the bill, the plaintiff has a clear right on this note and indorsement. Does *Hatcher's* letter to *McMorine*, which *McMorine* produces, and therefore makes evidence, vary the case. I think it makes it stronger for the plaintiff. That letter proves, I think, that *Hatcher* and *McMorine* were *Rogerson's* accommodation indorsers on the bill; it requires *McMorine* to pay him one half, and offers to take *Rogerson's* note (who was bound for the whole) with *McMorine's* indorsement for $500. For what? For *McMorine's* part of the $1000, which he (*Hatcher*) had paid on the bill, and of which it seems, from the letter, he held *McMorine* bound for one half;

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and *McMorine's* accession to the proposition, and his offering the letter in evidence, are very strong evidence that the fact is so. This superadds an obligation prior to and independent of the indorsement, on which he is sued. There is nothing then, but the testimony of the witness, who swears that the note in question was given for *Hatcher's* accommodation, upon which to rest the defence. But how for *Hatcher's accommodation?* The witness himself tells us, "that *Hatcher* might get it discounted at the bank, and thereby raise or get money to pay the bill". He must mean, to reimburse *Hatcher* for the money paid on the bill, as the case states, that *Hatcher* had before that time paid the bill. Then according to the witnesses' own account, it was not for *Hatcher's* accommodation. The parties may have called it so; but in reality from the witness' account, it was to pay *Hatcher* part of what was due to him from *Rogerson*, and according to the letter, and I think the acquiescence in the proposition contained in it, due to *Hatcher* by *McMorine* also, as co-surety on the bill. If the bill of exchange had been for *Hatcher's* accommodation, it cuts up the plaintiff's case. For then this note and indorsement have no value, no consideration to rest on. I thought I might have misunderstood the case, and examined it again, to see *what* the witness said was for *Hatcher's* accommodation. But I find the case is explicit. It is the bond on which this suit is brought.

The judge therefore, as I conceive, mistook the point of the case as to prior and posterior indorsers. It depended not on that solely, but on the question, whether the bill for $1000 was for *Hatcher's* benefit and accommodation. If it was, the plaintiff is entitled to recover.

I should have been glad to review the decision in *Daniel* v. *McRae*; as I am aware, that it has not given very general satisfaction; and the Supreme Court of the United States has decided a case in direct opposition to it, which I have seen and examined. But the reasoning is very far from satisfying me, that they are right, or that *Daniel* v. *McRae* is wrong.

PER CURIAM.—JUDGMENT REVERSED.

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RUFUS HAYWOOD *adm'r. of* J. G. BLOUNT v. EDMUND D. McNAIR.

A bond payable on demand, which is assigned eight years after its execution, is dishonored, and liable in the hands of the assignee to all the defences, which the obligor had against the obligee.

But these defences in order to be available at law must be legal defences.

This was an action of DEBT upon a bond executed by the defendant to *David Barnes*, and by him assigned to *Sherwood Haywood*, the first administrator of *J. G. Blount*. Upon the death of *Sherwood Haywood*, administration *de bonis non* upon the estate of *Blount* issued to the plaintiff.

The cause was defended upon the ground, that the bond was overdue when assigned, and that the defendant had a set-off against *Barnes*, to a greater amount.

On the trial at Edgecomb, before SWAIN, Judge, on the last circuit, the case was, that the bond on which the action was brought was for $428, payable on demand, with interest from November 1st, 1820, and dated January 9th, 1821. The plaintiff proved, that on the 25th of November, 1828, *Sherwood Haywood* sold the perishable property of his intestate upon a credit of six months, the purchasers to give bond with surety—that *Barnes* purchased a quantity of corn, amounting in value, to $408, and not having complied with the terms of the sale, the administrator directed his agent to call for a bond with surety—that on the 27th of the same month, *Barnes* deposited with the agent the bond on which the suit was brought, to remain in pledge until he had complied with the terms of the sale, and at the time of doing this requested the agent to say nothing about it to the defendant—that the agent did not mention the circumstance to *McNair*, until the month of April following, when *McNair*, upon the bond being presented to him, refused to pay it—that in May following, *Sherwood Haywood* had a conversation with *McNair*, when the latter observed, that "*Mr. Jackson* had a demand upon the estate of

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"*Blount* to nearly the amount of the bond, and *as* he had "it to pay, or *if* he had it to pay, he would prefer making "payment to *Jackson*," & requested that the matter might be arranged accordingly, which was agreed to. In the same conversation, the defendant requested that *Barnes* might be induced to take up the bond, and give another security, saying if he could get it back into his hands he had a set off against it. In the hope of effecting one of these proposed arrangements, the bond was retained by the agent until after the 1st of July following, when *McNair* refusing to pay it, an assignment of it was taken from *Barnes* to *Sherwood Haywood*, as administrator. The defendant produced a note for $1839, dated November 28th, 1828, payable the 1st of March, 1829, to *Sherwood Haywood*, signed by him as surety for *Barnes*, on which there was an indorsement of payment in full, on the 1st of July, 1829.

His Honor left it to the jury to enquire into the character of the transaction between *Barnes* and the agent of *Sherwood Haywood*, and instructed them, that if they should be satisfied that the request of *Barnes* not to mention the deposit of the bond to the defendant, and the compliance of the agent with that request, was the result of a combination between them to withhold the information from the defendant, that he might be the more easily induced to become the surety of *Barnes* in the note for $1839, to *Sherwood Haywood*, or with the view of defrauding the defendant in any way, the plaintiff would be affected by the fraudulent conduct of the agent, and they ought to find a verdict for the defendant. That if the bond was delivered on the 27th of November, 1828, in good faith, for the purpose of securing the purchases of *Barnes*, the deposit gave the administrator of *Blount* an equitable interest in it, and that having subsequently procured an assignment of it, he had thereby acquired a legal title, and had a right to institute this suit—that the fact that the defendant became *Barnes'* surety on the day following the deposit of the note by the latter, constituted no defence to the action; and that even if he had paid the money on that day, the assignee, having receiv-

ed the bond on the day previous, had the prior equity.

A verdict was returned for the plaintiff, and the defendant appealed.

The *Attorney General* and *Gaston*, for the defendant, cited 3 *Kent's Com.* 61. *Furman* v. *Huskin.* (2 *Caines* 369.) *Hendricks* v. *Judah.* (1 *Johns.* 319.) *Losee* v. *Dunkin.* (7 *Id.* 70.) *Meghan* v. *Mills.* (9 *Id.* 64.) *White* v. *Kibling.* (11 *Johns.* 128.) *Chitty on Bills*, 131, 2, 3. *Thompson* v. *Hall.* (6 *Pick.* 259.)

Hogg and *Badger, contra*, argued that as this set-off was not within the strict letter of the statute, but was only allowed upon the equitable principles adopted by courts of law, the delivery should be considered equivalent to assignment, as in a court of equity. (*Charles* v. *Marsden*, 1 *Taunt.* 223. *Sanford* v. *Mickle*, 4 *Johns.* 224.)

HENDERSON, Chief-Justice.—This note, altho' payable on demand, from the great length of time since its date, is overdue, and therefore dishonored; by which is meant, that if assigned, it is subject to all defences, and exceptions to its payment in the hands of the assignee, to which it was open in the hands of the assignor. But if the defences are of a legal nature, they are to be made in a court of law; if of an equitable nature, they must be made in a court of equity. The equities of the parties are not examinable in a court of law, any more than the equities between other parties. Therefore, whether *Haywood* had a right to call for an assignment, before the payment of the money by *McNair* as *Barnes'* surety, because the note was in his hands, as collateral security for a debt due from *Barnes* to him, and whether he had not forfeited that right as to *McNair*, by agreeing to keep the deposit secret, and not disclosing it to *McNair*, when he accepted him as *Barnes's* surety for the debt of $1839, are all questions, with which a court of law has nothing to do. And the principal question, and in fact the only one in this case is, what were the legal rights of the parties when the plea of *McNair* was put in. This depends on the rights of *Barnes* at the time of the assignment.

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If it was subject to the defence offered against *Haywood*, when in the hands of *Barnes*, it is subject to the same defence in the hands of *Haywood*. For *Haywood* took the assignment, subject to all exceptions, in his hands, to which it was subject when in those of *Barnes*, at and before the assignment. With this explanation, a mere statement of the facts will, I think, decide the question. At the time of the assignment, *McNair* had paid for *Barnes*, as his surety, money to a greater amount than was due on the note. *Barnes* was then *McNair's* debtor to that amount. And if *McNair* had then been sued by *Barnes* on this note, he could have pleaded this debt in bar to the action, as a set-off. Therefore when sued by *Haywood* as *Barnes'* assignee, the same defence being open to him, not to be sure by way of the plea of set-off against *Haywood*, but in bar of *Haywood's* action by reason of the set-off, which he had against *Barnes*, the defence must be sustained. For it has been often said before, if the set-off against *Barnes* was a bar to *Barnes'* action, it is a bar to *Haywood's* also. The conversation which passed in April did not amount to such a fraud on the part of *McNair*, as to preclude him from using this defence. Nor is it an abandonment of it. What he then gave up, (if he gave up any thing,) was not purchased by *Haywood*. He neither paid any thing, nor did he forego any right in consequence of it; nothing grew out of it beneficial to *McNair*, coming from *Haywood*. Nor was any loss suffered by *Haywood* in consequence of any promise made by *McNair*. But it is evident that no new obligation was intended to be incurred by the one, or acquired by the other. I forbear to enter into an examination of the authorities, for they are not in opposition to what has been said. The case in *Johnson* only establishes this position: that where there is any thing flowing from the maker, which holds out that a note, although overdue, is still unpaid in whole or in part, as by making payments, he shall not be permitted to say that nothing is due on it. It would be more consistent with principle, if it had precluded the maker from showing that nothing had ever been due, as a total mistake in giving it.

For the partial payments are in opposition to such an averment. For I cannot see how a partial payment precludes a partial mistake in the amount due being shown. It does not appear to me, that such a circumstance renders a dishonored note negotiable again, in the proper sense of the term. When a note is given, it is an acknowledgment that the amount is due. The making of a partial payment amounts only to the same thing, that a balance is due; which balance may become dishonored, if not paid in a reasonable time on a note due on demand: to which such payment may possibly convert all notes, where the time of payment is past. But let this be as it may, *McNair* held out no false lights as to the facts to *Haywood*. *Haywood* was as well acquainted with *McNair's* ground of defence as *McNair* himself; and much better with his equitable grounds, from the time he took *Barnes'* note with *McNair* as surety, until *McNair* knew that *Haywood* held the note in question, as collateral security for another debt.

There is nothing in the argument, that as the demand is not against *Haywood*, but against *Barnes*, it cannot be used as a set-off; because that relates to mutual debts between plaintiff and defendant. The point is, if *McNair* had a set-off, a counter claim against *Barnes*, it forms a plea in bar against his assignee. The conclusion of the plea is not as in the plea of set-off; and therefore he sets off said debt against a demand on the part of the plaintiff, and which of course he acknowledges to be due the plaintiff; but he pleads the demand against *Barnes* as a bar to *Haywood's* action, to whom he denies any thing to be due.

HALL, Judge.—From the statement of the case furnished by the record, it is necessary to ascertain what are the legal rights of the parties.

It appears that the note, on which the suit is brought, was executed on the 9th day of January, 1821, payable on demand; that it was deposited with *Sherwood Haywood's* agent, on the 27th day of November, 1828, and that it was assigned to *Sherwood* after the 1st day of July, 1829. At that time *Sherwood Haywood* first acquired

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the legal title to it; and as the note was payable many years before that time, he could only acquire by the assignment, such legal rights against *McNair*, as *Barnes* himself could enforce against him. This leads to the inquiry, What were the rights of *McNair* against *Barnes*, or in other words, what defence could *McNair* set up to a suit brought on the note by *Barnes*.

It appears, that before the assignment was made to *Haywood*, *McNair* had paid for *Barnes*, upon a judgment obtained against *Barnes* and himself as surety for *Barnes*, the sum of $1839, besides interest. There was certainly nothing to prevent him from pleading that as a set-off, to a suit brought on the note against him by *Barnes*; consequently, as *Haywood* succeeded only to *Barnes'* rights, he may make the same defence to an action brought on the note, by him, as assignee of *Barnes*.

But it has been relied upon in argument for the plaintiff, that circumstances have occurred, which throw this case out of its ordinary legal channel. It appears, that *Sherwood Haywood* and the defendant had a conversation in the month of May, in which the defendant remarked, that "*Mr. Jackson* had a demand upon the estate of plaintiff's intestate of about the amount of the bond; and *as he had it to pay*, or *if he had it to pay*, he would prefer making a settlement with *Jackson*," and asked that an arrangement of this kind might be made, which was agreed to. The defendant further requested, if it could done, that *Barnes* should be induced to take up the bond by substituting one on some other person, saying that if he could get it back into his hands, he would have a set off as against him. Now I think it makes no difference, whether in this conversation the defendant said, *as* he had it to pay, or *if* he had it to pay. Be it either, he only showed an ignorance of the law of his case. It certainly did not amount to a promise or a new contract. In the conversation, the defendant manifested a disposition to avail himself of his set-off against *Barnes*. His mistake was, that he did not know he could do so against the plaintiff.

Another circumstance may be here noticed, which (if it has any effect) certainly militates against the plain-

tiff's claim. When the note was deposited with the plaintiff's agent, *Barnes* requested him to keep it concealed from the defendant. He did so until the following April, when application was made for payment, and the defendant refused to pay it. The day after the note was pledged, the defendant became *Barnes'* surety for the money, which the case states he has since paid off. Now had the defendant known, that *Barnes* had parted with his note, he might less readily have entered into that suretyship.

I see no grounds on which the plaintiff is entitled to recover, and I think the rule for a new trial should be made absolute.

PER CURIAM.—JUDGMENT REVERSED.

GEORGE W. WOODMAN v. JOHN MOORING.

After a bond has been discharged by the principal debtor, it cannot be set up again to the prejudice of a surety, by a subsequent agreement between the principal and the obligor.

DEBT, upon a single bond, executed by one *Pinkit*, with the defendant as surety.

Plea—*payment*, on which it was tried before SWAIN, Judge, at Martin, on the last circuit.

The defendant proved, that the plaintiff came to the house of *Pinkit*, and purchased from him a negro for $550, from which was to be deducted the amount of the bond, and the residue to be applied to other debts due the plaintiff—that the boy was not then delivered, and that the sale was to be completed by the delivery of the slave at the residence of the plaintiff, the ensuing week—after which the boy was seen in his possession. To rebut this testimony, the plaintiff offered to prove by his clerk, that a year after the time when the sale was alleged by the defendant to have been made, he and *Pinkit* made another contract, by which a debt due him by *Pinkit*, incurred after that time, was to be paid from the purchase money and the residue applied to the bond in suit.

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His Honor refused to receive this testimony, thinking it to be irrelevant, and the defendant had a verdict; whereupon the plaintiff appealed.

The *Attorney General* and *Gaston*, for the plaintiff.

Hogg, contra.

HALL, Judge.—The question presented in this case is, whether the judge erred in rejecting the testimony of the plaintiff's witness who lived with him as a clerk. I think that evidence was properly rejected; because admitting the facts to be as the plaintiff proposed proving them by that witness, he was not entitled to recover against the present defendant. I do not speak of the effect or relevancy of the evidence in case *Pinkit* was sued. When the plaintiff purchased the negro boy, or when he was delivered perhaps, according to the testimony the bond was paid in pursuance of the express contract between *Pinkit* and the plaintiff, and the defendant was discharged from his suretyship; and no contract which the plaintiff and *Pinkit* could afterwards enter into, could revive it, and make the bond again obligatory upon the defendant. It not only appears that the bond was discharged by the sale of the negro to the plaintiff, but a balance of the purchase money remained, and was to be applied to *Pinkit's* credit in some other way. If the rejected evidence amounts to any thing, it shows an unfair combination between the plaintiff and *Pinkit* against the defendant. It certainly discloses no merits on the plaintiff's side to entitle him to recover.

PER CURIAM.—JUDGMENT AFFIRMED.

JOHN W. PULLEN v. JOHN SHAW *adm'r. of* W. S. ROBERTS.

An alteration in a deed, which is prejudicial to the obligee, as where the date was altered so as to deprive him of one year's interest, is presumed to have been made before the execution.

DEBT upon the following bond of the defendant's intestate: "One day after date, I promise to pay J. W.

"P. the just sum of nine hundred and eighty seven dollars fifty seven cents, for value received. Witness my hand and seal, this 11th November, 1821."

Plea—*non est factum*, upon which the cause was tried before SWAIN, Judge, at Wake, on the last circuit.

The defendant contended,

1st. That the note was a forgery.

2d. That the obligor and obligee had dealings in the bank, and that the plaintiff's intestate had signed the paper in blank with the view of being used, upon applying for a discount, and that the plaintiff had fraudulently filled up the blank signature.

3d. That the bond had been altered, having been originally, 11th November, 1820, instead of 1821.

Upon these points many witnesses were examined, and the examinations certified with the record. It was manifest upon inspection that the date had been altered. The body of the note and the erasure was in the plaintiff's handwriting, and the defendant attempted to prove that the alteration benefited the plaintiff, by rendering an admission of his, concerning the accounts between him and the intestate, consistent with the date to which it was altered.

The counsel for the defendant moved the court to instruct the jury, that as the bond on its face appeared to be altered, it was incumbent on the plaintiff to shew its fairness. But his Honor, leaving the two first grounds of defence to the jury upon the facts, charged them that if the plaintiff had, after the execution of the bond altered the date, without the knowledge and consent of the obligor, he could not recover. A verdict was returned for the plaintiff, and the defendant appealed.

Seawell and *Gaston*, for the defendant, argued that an erasure or alteration in a deed, in the absence of proof, was presumed to have been made before execution. (10 *Coke*, 92 *b note*. *Bac. Ab. Evidence F. Henman* v. *Dickinson*. 15 *Eng. C. L.* 407).

Badger and *W. H. Haywood, contra*, cited 12 *Vin. Ab. Evidence* 2 *a* 2 *pl.* 5. *p.* 50. *Flower* v. *Castle*. (*Keble* 121). *Morris* v. *Vanderen*, (1 *Dal.* 674). *Cruise Digest*

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Deed, c. 26, s. 10. *Shep. Touch.* 69. *Chitty on Bills* 105, 106. 107. *Dane's Ab. Deed.*

Henderson, Chief-Justice.—Erasure avoids a deed when made by the party claiming a benefit under it, *even if it be in an immaterial part*; if made by a stranger, in a material part, it also avoids the deed; if *by accident*, it does not. Formerly, the court judged of an erasure by inspection—latterly, the jury do. In judging by inspection, the court governed itself as juries do now, by probabilities in the absence of positive proof. If the alteration on the erased part was in the handwriting of the obligee or a stranger, and beneficial to the obligee, the court adjudged it an erasure, that is, an alteration made after the execution, and avoided the deed. If prejudicial to the obligee, the court adjudged it no erasure, that is, made before execution, and did not avoid the deed. If in the handwriting of the obligor either way, they adjudged it no erasure, that the alteration was made before execution, and did not avoid the deed. Juries are now governed by the same rules. In the case before us, the date of the bond is altered, and it is made payable in 1821, instead of 1820, as it is said, is evident from the erasure not being complete, as appears from an inspection of the deed, and the alteration is in the handwriting of the obligee, and prejudicial to the obligee; for he loses one year's interest. It is payable from the date, or from a fixed period from the date. One of the rules before mentioned, to wit, that if the alteration is prejudicial to the obligee, though in his handwriting, it is no erasure, determines this case, as it is presumed that the alteration was made before execution. If the question was to be decided by the court, as formerly, we should pronounce it to be no erasure. In the absence of all evidence *dehors* the deed, the jury were properly instructed to pronounce it so. The plaintiff has failed in his evidence to prove, if that was his object in putting it on the record, that the alteration was beneficial to the obligee, by showing that he thereby avoided the effect of his admissions as to the state of the account against the defendant, by changing the date from 1820 to 1821.

Per Curiam.—Judgment affirmed.

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Den *ex dem.* Caleb White v. William Albertson.

A *cestui que trust*, who obtained possession in that character, is not permitted at law, to deny the title of the trustee. And where he has admitted it by a parol declaration, a purchaser under the trustee is not bound to prove the title of the latter.

Moore v. Gidney 75. N.C. 34.

McAden v. Hooker 74 N.C. 24

Ejectment for a lot of ground in Elizabeth, tried on the last circuit, at Pasquotank, before his Honor Judge Martin.

The plaintiff proved, that the defendant had admitted that *William T. Muse* and *John Mullen* had bought the lot for him, and that he was to have it when he paid the purchase money—that he had complied with this engagement, and claimed the lot as his property.

The plaintiff then introduced the record of a suit in equity against *John B. Blount*, the executor of *William T. Muse*, in which the plaintiff had obtained a decree for $ 1935, and on which, as the plaintiff admitted the executor to have fully administered, a *scire facias* was ordered to issue "to the heirs and devisees of *Muse*, by their guardian *John B. Blount*." In pursuance of this order a *scire facias* issued reciting the decree and the descent of lands, and directing the sheriff "to make "known to the said *John B. Blount* guardian to the heirs "of the said *William T. Muse* that he appear &c." which was endorsed "service accepted, *J. B. Blount* guardian "of *J. B. & W. T. Muse, per Thomas M. Blount.*" Afterwards an entry was made "that execution issue to "sell the land for the amount of the decree." An execution issued according to this order, and the lessor of the plaintiff purchased at sheriff's sale and took a deed to himself. The plaintiff also proved that *John B. Blount* was the executor of *Muse* and guardian to his children; and contended, that as the defendant claimed under him, he was estopped to deny his title, and could not set up an equitable defence in this court. But his Honor being of a different opinion, a nonsuit was entered and the plaintiff appealed.

Kinney, for the plaintiff, contended,

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1st. That the plaintiff would not be permitted to deny the title of *Muse*, under whom he claimed. (*Jackson* v. *Stewart*, 6 *Johns.* 34).

2d. That the defendant pretended to have only an equitable title, which was no defence in a court of law. (*Reade* v. *Reade*, 8 *T. R.* 118. *Jones* v. *Jones*, 7 *T. R.* 43).

3d. That the judgment upon the *sci. fa.* improperly brought upon the decree was erroneous only, and not void; and therefore a title obtained under it was valid until the judgment was reversed. (*Bac. Abr. Void* and *Voidable. Oxley* v. *Mizle*, 3 *Mur.* 250. *Pigot* v. *Davis*, 3 *Hawks* 25. *Anon.* 1 *Salk.* 400. *Andrews* v. *Lynton*, *Id.* 265. *Denton* v. *Noyes*, 6 *Johns.* 296).

Iredell, contra.

A judgment cannot be collaterally impeached for error; if rendered according to the course of the court, however erroneous, it is valid until reversed.

HENDERSON, Chief-Justice.—We cannot look into the mere errors in rendering judgment, but only into its regularity according to the course of the court. For if the judgment be regular, however erroneous we may think it is, it has, until reversed, all the power and effect of a judgment.

Although satisfaction of a decree against an executor who has fully administered, can now be had out of the lands of the testator, only upon a bill against the heir, yet a sale under an order made upon a *sci. fa.* is valid.

The process of *sci. fa.* against heirs, to enforce a decree in equity against the executor or administrator of the ancestor upon a deficiency of assets, until declared to be improper by this court, in the case of *Jeffreys* v. *Yarborough*, (1 *Dev. Eq. Cases* 506,) a decision in which I did not concur, was the common and ordinary mode of proceeding. We cannot impeach the judgment for that irregularity. It would unsettle too much property. Nor can we impeach it, because a default, or judgment by *nil dicit* was taken against the infant heirs; for this is only error, but does not render the judgment null. The only objection, which has the appearance of solidity is, that the defendants, the heirs, were not made parties. And if the fact be so, the judgment is void. For there can be no judgment, but against one in court. It is not according to the course of the court, to render judgment against one not brought into court. The *sci. fa.* in this case is not against the proper person. It should have been against the heirs themselves. But when the ser-

A judgment by *nil dicit* against an infant heir is not void, but only erroneous.

Where judgment was rendered against an infant upon process issuing against his guardian, who appeared for the infant, this appearance, altho' irregular, is taken to have been sanctioned by the court.

vice was admitted by *John B. Blount*, the guardian of *J. B.* and *W. T Muse*, we must then consider *J. B.* and *W. Muse* as in court. For that court was the proper judge. It is so decided; and it cannot be contradicted in this collateral way, whether they were properly in court. whether *John B. Blount* was their guardian, or whether it was competent for *Thomas H. Blount* to admit service for *John B. Blount*. For it is evident, that these points were, either expressly or impliedly, so adjudicated by the court. The court may have erred, and certainly acted very unadvisedly, in permitting the executor to defend as guardian. For on his full administration it depended, whether execution was to issue against him or the heirs. The judgment therefore is not void, neither is it taken contrary to the course of the court.

The lot was sold as the property of the heirs of *William T. Muse*; and it was proved, that the defendant declared, that *Muse* and one *Mullen* purchased it for him; and that when he paid the purchase money it was to be his, and that he had paid the money. The plaintiff showed no conveyance but the sheriff's deed. The defendant showed no title. As to setting up an equitable title, it has been long since exploded for reasons much better than I can give. I can see no reason why, after the declaration that the defendant held under *Muse*, or that *Muse* had the legal title, and that he had only an equitable one, when sued by *Muse*, his acknowledged trustee, or a purchaser under him, that he should put the plaintiff to the proof of that which he had admitted. The adoption of such a rule would destroy all confidence between man and man. It is true, that the admission does not give *Muse* a title, for that would be to give him one by mere parol; but it requires, that the defendant should not retain that possession against *Muse*, which he acquired from *Muse* in confidence, and as his *quasi* tenant. After having surrendered that possession, he may controvert *Muse's* title; but he shall not weaken it by setting up a possession thus confidentially acquired. In this case, however, the plaintiff upon this evidence is entitled to recover possession of one half only, for the de-

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fendant obtained it under *Muse* and *Mullen*, and the plaintiff represents the former only.

When I say, that the *scire facias* should have issued against the heirs of *Muse*, and not against their guardian, I do not mean, that it must be against the heirs *by name*, for I think, that a *scire facias* directing the sheriff to make known to the heirs generally, without naming them would be good.

A judgment is void when rendered contrary to the course of the court, but if improperly rendered against a party when it should have been in his favor it is only erroneous.

A judgment is void and confers no rights against *any one*, (wherever and however it may be introduced, either directly or collaterally,) when it is taken *contrary to the course of the court*. It is erroneous, when the court mistakes the law, and renders judgment for one party, when upon the record, it should have been rendered for the other; or rather, when a judgment different from the one given should have been rendered; but in that case it is as binding until reversed, as if it were not erroneous.

Per Curiam.—Judgment reversed.

James Moore *Ex'r.* v. Solomon Tickle.

No power can be inferred from a relation of master and servant, whereby the servant can bind his master. Hence a groom has not the right to vary from his employer's terms, unless a special authority be proved.

This was an action commenced by a warrant, wherein the plaintiff sought to recover five dollars for the season of a mare belonging to the defendant, to the horse of his testator.

The cause was tried before Norwood, Judge, at Orange, on the last circuit, when the plaintiff having proved that the horse was advertised for the season at five dollars, and that the defendant's mare was put to him for that period, the defendant proved a special agreement with the groom, whereby he was to pay but three dollars and fifty cents, and offered some evidence of a custom among the keepers of horses, whereby the grooms were permitted to alter the advertised prices.

His Honor informed the jury, that if it was the custom for grooms to make special contracts with the owners of mares, they might from the evidence in the cause, presume the agency of the groom, and in that event the plaintiff would be bound by the agreement between his groom and the defendant.

A verdict was returned for the defendant, and the plaintiff appealed.

No counsel appeared for the plaintiff.

Nash, for the defendant, submitted the cause.

HALL, Judge.—The terms which the plaintiff held out to the public were notorious. There is no complaint that the defendant was ignorant of them. The employment of the agent did not lead him into contact with those terms; it had no relation to them. He had no right to alter them in whole or in part. If the defendant and the agent made a contract in contravention of them, it must have been understood, or ought to have been understood, that it was not obligatory without the assent of the employer.

But a custom sanctioning this agreement with the agent has been relied upon. I imagine it would be very difficult to prove such a custom. Instances of such secondary contracts may have happened, and been connived at. But such instances fall far short of establishing a custom, which is to be considered generally obligatory. There is no necessity in this case to presume, that an implied power was given by the employer to the agent to alter the terms held out to the public. If the employer had thought proper to confer such a power, he could easily have expressed it. This is not like the case of a salesman behind the counter. He is identified with his employer. He acts in the room and place of his employer in selling goods. He is placed there for that purpose; and his employer is bound by his acts. But a principal is not bound by a regulation entered into by his agent, unless it come within the scope of a delegated authority.

RUFFIN, Judge.—The terms expressed in the advertisement may certainly be varied by a special contract;

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and that contract may be made with the owner of the horse or his agent. But if made by the latter, his character must be proved. This is not done by the evidence in this case. There is no proof of an express agency to this purpose. Nor can an authority to make special bargains be inferred from the relation between the parties. A groom is the mere servant, menial as it were, not the general agent of the owner of the horse. And as to what the case calls "some proof of a custom," I must say that the understanding or misunderstanding of the law in a particular neighborhood, or by a portion of the people in the neighborhood, cannot enlarge the powers of a lackey into those of an agent, capable of controlling the contracts of the master.

Customs are of two sorts, general and local. The former needs no proof, but are judicially known and form part of the law. The latter, if proved, cannot alter the law, or form a ground of the construction of a contract, except in a very few cases, which are mostly of a mercantile character.

If indeed there had been proof, that this groom had made other contracts on terms variant from those advertised, and the master recognized them, by receiving payment according to them, or otherwise treated them as valid, it would have been different. That would have been evidence, that in this particular case there was, in fact, an agency, as understood by all parties. But there was no evidence of that sort. And such an agency cannot be inferred from the circumstance, that some other grooms have been, or have been understood to be their master's agents. A groom is not known, as a trader's shopman or a merchant's clerk; and therefore, there must be evidence of an actual authority in the former, to make contracts different from those offered by the owner.

PER CURIAM.—JUDGMENT REVERSED.

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JOHN FINLEY v. WILLIAM D. SMITH.

The proper county to which a *ca. sa.* should issue, in order to charge the bail, is the county where the original writ was executed.

The case of *Benton* v. *Duffy*, (*Conf. Rep.* 98,) approved in part.

This was a SCIRE FACIAS against the defendant, as the bail of one *Newton*. The *sci. fa.* recited that the original writ against *Newton* had issued to the defendant as sheriff of Buncombe, who executed it, but took no bail bond.

Plea—that the *ca. sa.* upon the judgment obtained by the plaintiff against *Newton*, had not issued to the county of Buncombe, with an averment that Buncombe was the proper county, to which the writ should have been directed.* Replication that the *ca. sa.* had issued to the county of Lincoln, where *Newton* was domiciled, and which was the proper county to which the writ should have been directed. Issue was taken upon the facts pleaded in the replication, which was tried on the last circuit, before his Honor Judge DANIEL, at Wilkes.

On the trial, it appeared that *Newton* was a single man without a house or land—that he was a plasterer by trade, and went about the country procuring work where he could find it—that after his arrest he left Buncombe county, and went to Lincoln, where he undertook to plaster a house, and remained for three weeks, when he left the state.

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* The 19th section of the act of 1777, is as follows: "That all bail "taken according to the directions of this act, shall be deemed, held "and taken to be special bail, and as such liable to the recovery of the "plaintiff; but the plaintiff, after final judgment, shall not take out "execution against such bail, until an execution be first returned that "the defendant is not to be found in his proper county, and until a "*scire facias* hath been made known to the bail, which *scire facias* shall "not issue till such execution shall have been so returned; and after "return of such execution against the principal, and *scire facias* against "the bail, execution may issue against the principal and securities, or "any of them, or any of their estates, unless the bail shall surrender "the principal before the return of the first *scire facias*, or shall appear "and plead upon the return thereof; any law, custom, or practice, to "the contrary thereof, in any wise notwithstanding."

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His Honor charged the jury, that the proper county to which the *ca. sa.* should have been issued, was that where *Newton* had a domicil, or had last resided—that if it was unknown to the plaintiff where his domicil was, the law presumed it to be in the county where the original writ was executed, but that presumption might be rebutted—that if they were satisfied that *Newton* had abandoned Buncombe county, and had gone to Lincoln to work at his trade, then it would not be proper to direct the *ca. sa.* to that county, but it should have issued to Lincoln. That if they thought *Newton* had entirely abandoned Buncombe, when he left it for Lincoln, then a residence in the latter county of three weeks, together with the fact that the plaintiff was ignorant of his having left the state, would enable them, if they thought proper, to infer that Lincoln was the proper county.

A verdict was returned for the plaintiff, and the defendant appealed.

No counsel appeared for either party.

RUFFIN, Judge.—The question is, what is the *proper county* within the act of 1777, (*Rev. c.* 115, *s.* 19,) to which the *ca. sa.* shall issue before charging the bail.

In England, it is the county in which the *venue* was laid. (*Dudlow* v. *Watchorn*, 16 *East* 39). And as that in transitory actions is at the election of the plaintiff, and need not be that in which the defendant lives, or was arrested, it seems, as *Mr Tidd* remarks, that the *ca. sa.* is not intended there actually to cause an arrest of the principal, but rather to intimate to the bail, to what species of execution the creditor means to resort. The purpose is not so much to take the body on the writ, as to let the bail know that he must render the body. Hence it is only necessary to take effectual means of giving that notice; which is held to be by depositing the writ in some certain sheriff's office, to which the bail can have recourse for enquiry; and that in which the action was laid, has been the one selected in all cases.

We think however, that our legislature meant that and something more, in our statute, and that the *ca. sa.* is required as well for the benefit of the bail as the plaintiff.

The *ca. sa.* ought to be issued to the county, where it may be executed by the actual arrest of the defendant, if that can be done; and if that cannot be done, then to the county in which it will most probably give notice to the bail. For the words are not "in *the* proper county" but "if the defendant cannot be found in *his* proper county." This is *prima facie* the county, in which the defendant was originally arrested; because his residence must be taken to have then been there; because it is presumed the bail reside there, and will get notice by the writ; because the plaintiff is not to be charged, at his peril, with the duty of taking notice of the defendant's change of residence; and because, in case the defendant leaves the state, or has no fixed residence in another county in the state, there is no other certain place, to which the defendant can send his execution; and the law surely intended to give some certain one. This we take to be the principal point decided in *Benton* v. *Duffy*, (*Conf. Rep.* 98) which is believed to have been followed ever since. But as I have before said, the execution required in our act was intended to be an effectual one. If sent into the county where the *capias ad respondendum* was served, it would not have that character, in case the defendant had in fact removed from it. In that event, it ought to go to the county where he then resides, provided the plaintiff has knowledge of it. There is no reason for obliging the plaintiff to know where the defendant lives. He has a right to presume, as against the bail, that his original county is yet his proper county, until it be shown that he knows the contrary, or had reason to know it. Upon this point therefore, the court now differs from *Benton* v. *Duffy*, if in that case the demurrer to the rejoinder was sustained. The report is obscure, and it does not appear, what judgment was directed to be given; nor do I understand what is meant in the latter part of the opinion, where it is said, that the county of the arrest ought not to be departed from, unless a return of the sheriff evinces, that such county no longer continues to be his proper county. It is clear, however, in the admission, that the original county is to

If the defendant has no fixed residence in the state, then the *ca. sa.* ought to issue to the county, where the bail bond was taken, that the bail may have notice.

But if the defendant has acquired a domicil in another county, and the plaintiff has notice of it, the *ca. sa.* ought to issue to that county.

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be departed from, where it satisfactorily appears that it no longer continues to be the defendant's proper county. And I do not know, how that could be more conclusively established than by a plea, that at the time of issuing the *ca. sa.* to one county, the principal resided in another county, and the plaintiff knew it; and an admission thereof by a general demurrer. We think in that case, that the county of the defendant's present residence is "*his* proper county," and in that respect concur with the judge of the Superior Court.

A temporary residence by a single man without property is not such a change of domicil as justifies the plaintiff, in order to charge the bail, in issuing the *ca. sa.* to any other county than that in which the original writ was executed.

But we think that court erred in saying, that Lincoln was, or could be found by the jury upon the evidence, to be the proper county of *Newton*. The plea is, that there was no *ca. sa.* to Buncombe, in which *Newton* was first arrested. The replication is, that there was a *ca. sa.* to Lincoln, which was the domicil of *Newton*; and on this last point, to wit, the domicil and residence, the rejoinder takes issue. The evidence does not establish any thing like a domicil. On the contrary it proves, that Lincoln was not *Newton's* place of residence—home. He had, in truth, no place of residence in North Carolina, certainly not in Lincoln. Without house, land, family, he wandered about the country, seeking employment *de die in diem*; and only stayed three weeks in Lincoln for the temporary purpose of plastering a house. What rights as a citizen was he entitled to, or to what duties was he subject in that county? He could not vote; he was not liable to military duty, nor bound to repair the highways. He sojourned there, but did not reside there. It was not *his* county, and his stopping in that county was no more to the purposes of residence, than boarding for a week, or putting up a tavern for a night. He did not *dwell* there, nor did he purpose so to do. The judge of the Superior Court seems to have thought, that the abandonment of Buncombe by *Newton*, and going into another county for any purpose, makes the former cease to be the proper county. Clearly not. It is not alone that he leaves Buncombe; for if he went out of the state, then there would be no proper county; nor that he goes into another, which makes the latter his proper county.

For he must go there to inhabit and dwell, either for an indefinite period, and for the general purposes of livelihood, or if for a definite time, through the seasons of the year, as an overseer or the like. But a mere casual employment in a job of a few weeks will not give him a domicil there, although he may not have one elsewhere. He is a citizen of the world—a mere bird of passage; not an inhabitant.

This is not like the case of one having no fixed residence, dying at a particular place, as to the purposes of administration and distribution. There, the place of death must be taken, because there is no other. Here, the converse is true. The accidental and occasional place of being is not taken because there is another certain place, namely, the county where the writ was served; which continues to be "his proper county," until some other is adopted as a fixed residence.

PER CURIAM.—JUDGMENT REVERSED.

JACOB CONRAD v. DAVID DALTON.

A *sci. fa.* suggesting a *devastavit* by an administrator does not survive against his executor.

This was a SCIRE FACIAS, reciting that the plaintiff obtained a judgment against *Isaac Dalton*, administrator of *Jonathan Dalton*, upon which a *fi. fa.* had issued, which was returned *nulla bona*; and it was suggested that assets of the said *Jonathan* had come to the hands of the said *Isaac*, and had been by him wasted. After the return of this writ the death of *Isaac* was suggested, and process issued to revive the suit against the defendant, his executor. The defendant appeared to this process, and filed a general demurrer; which was sustained by his Honor Judge MANGUM, and thereupon the plaintiff appealed.

The case was submitted without argument by *Devereux* for the plaintiff, and *Nash* for the defendant.

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Henderson, Chief-Justice, after stating the substance of the pleadings, as above set forth, proceeded: This is an attempt by the creditor to reach the assets of the debtor, (*Jonathan Dalton*,) in the hands of the executor of the administrator; which certainly cannot be done at law. For neither the administrator of the executor, nor the executor of the administrator represents the first testator or intestate. The unadministered assets belong to the administrator *de bonis non* of the first dead man, and may be recovered by him, and when so recovered are assets in his hands. And if he neglects to recover them, it is a *devastavit*, and he is responsible for their value; viz: for what he might have recovered. Where the goods have actually been wasted by the first executor or administrator, I am at a loss to say, what is to be done. For a *devastavit* is in *tort*, which dies with the person. Perhaps our acts of Assembly, reviving all causes of action, where property is the subject of controversy, that is, all which are not merely vindictive, will enable the administrator *de bonis non* to sustain an action, even where there has been an actual *devastavit*. Where the goods remain in kind, and are unadministered, there can be no doubt, that the administrator *de bonis non* may recover them. But in no case which I can conceive, is the administrator of the executor, or the executor of the administrator liable, at law, to the actions of creditors of the first testator or intestate. Where the executor or administrator becomes fixed with assets, it is then his own debt; and his executor or administrator is liable. Property or debts, in compensation for a *devastavit*, may in equity afford ground of relief to creditors, legatees and distributees upon a *proper* case. But the executor of the executor, where there is only one executor of the first testator, or of the surviving executor, where there are more, is liable at law. For in fact, he is the executor of the first testator.

In no case is the executor of an administrator liable at law to the creditors of the intestate.

But upon a proper case he may be made responsible in equity, on the ground that he is in the possession of the fund liable to the payment of debts.

When I say, that independently of our acts of Assembly keeping alive actions for *torts*, where property is the subject matter of them, I am at a loss to say how in the case of a waste of property by the executor or first ad-

Is there any remedy against the executor of an administrator

ministrator, the administrator *de bonis non* could obtain satisfaction, I mean where the property has been *destroyed*. If the executor or administrator has converted the goods into money, and failed to apply it to the uses of the estate, it is so much money in his hands, for which the administrator *de bonis non* may support an action, I suppose, for such money received to his use. But this is rather straining the action for money had and received. For it cannot, otherwise than by a fiction, be said to have been received to the use of the administrator *de bonis non*. To sustain the action, we must personify the estate; and as the administrator *de bonis non* represents the estate, give the action to him. There is no difficulty when the property remains in kind. And I believe, by a justifiable extension of our acts before mentioned, they may embrace cases of actual waste.

for a *devastavit*, by the destruction of assets? *Quere.*

But if the administrator has converted the assets to his own use, *it seems* the administrator *de bonis non* may recover against his executor for money had and received.

PER CURIAM.—JUDGMENT AFFIRMED.

JOHN HODGES v. FARQUAR ARMSTRONG, *Admr. of* THOMAS ARMSTRONG.

A judgment against a surety will not entitle him to maintain an action for money paid to the use of the defendant, until it has been satisfied.

ASSUMPSIT for money paid to the use of the defendant, tried before his Honor Judge DANIEL, at Cumberland, on the last spring circuit. On the trial, upon *non assumpsit* pleaded, the case was as follows:

The plaintiff was the surety of the defendant's intestate and of one *William Hodges*, upon a bond payable to one *McArthur*; before the bond became due the principal debtors died, and the plaintiff administered upon the estate of *William Hodges*, and the defendant upon that of *Armstrong*; suit was brought by *McArthur* against the plaintiff and defendant in their representative characters, and against the plaintiff upon his personal obligation. On the trial, the plaintiff, as administrator, established the plea of full administered; and judgment was

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taken against the present defendant, *de bonis intestati*, and against the plaintiff, as administrator, *quando*, and in his own right absolutely. To protect himself, the plaintiff, through the intervention of a third person, paid the amount of the judgment to *McArthur's* attorney, and procured an assignment of it to be made to a trustee for his benefit, and issued a *scire facias* to obtain execution against the present defendant, *de bonis propriis*; but the payment by the plaintiff having been held to be a satisfaction of the judgment, he failed in that action and then commenced the present. Upon these facts it was objected, that the plaintiff could not recover, because he had not paid the money to the use of the defendant, but had purchased a judgment against the defendant, and that his proper redress was either by *sci. fa.* or debt upon that judgment. But the presiding judge ruled, that the payment was one which would support the action.

The defendant then contended, that the plaintiff, as administrator of *William Hodges*, had received assets since the rendering of the judgment, which were subject to the payment of the debt to *McArthur*, and that as far as those assets extended, they were to be applied to the payment of that debt. On this ground, the defendant was permitted to investigate the account of the plaintiff, as administrator of *William Hodges*. In making this examination the plaintiff claimed commissions on the estate; but the claim was resisted by the defendant, because no order of the County Court was produced, whereby they were allowed upon a final settlement of the administration account. His Honor overruled the objection, and a verdict was returned for the plaintiff. The defendant appealed, and it was agreed in case the opinion of the court was against the plaintiff on the first point, that a judgment of nonsuit should be entered.

W. H. Haywood, for the defendant.

Gaston, for the plaintiff.

Ruffin, Judge.—As a surety cannot maintain an action against his principal merely upon the rendering of a judgment against the former, it was material and ne-

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cessary that the plaintiff in this case should show a satisfaction of the judgment by a payment made by himself. To make that fact appear, he proved that he deposited the money with a friend, to be delivered to the original creditor, with express directions not to pay it in discharge and satisfaction of the judgment, but to take an assignment thereof, for the purpose of keeping it in force against the defendant. The agent complied with the instructions, and took from *McArthur* an assignment to himself, in trust for the plaintiff. This transaction was held in the Superior Court to be a payment. This court entertains a different opinion. There was no satisfaction of the judgment acknowledged of record; no release of it; nor any receipt of money as and for a payment of it. No payment was intended. Both the testimony of the witness and the deed of assignment prove, that the contrary was intended. The question then is, whether, against the intention of the parties, the payment shall be deemed to be in satisfaction, because the money belonged to one of the defendants in that suit. We think not. It is a common mode, whereby a surety indemnifies himself. He may relinquish it by making payment in satisfaction. But he may make the payment, not in satisfaction, and take an assignment. If the surety is not a party to that suit, he may take the assignment to himself. This is generally done by an indorser, who is not sued jointly with the maker. It is greatly for the benefit of sureties that it should be so; for many of the rights of the surety are secured only through this principle of subrogating him to the securities of the creditors, and entitling him to an assignment of them. Hence, if the creditor does any act which puts it out of his power to make an assignment to the surety, the latter is discharged. By taking an assignment, the judgment is preserved, and satisfaction may be obtained from the principal by immediate process; which is of great consequence in a case of insolvency or the death of the principal. If the judgment be joint against the surety and the principal, the former does not thereby lose his right to an assignment. If he did, all claim to the benevolence of the creditor

To enable a surety to recover for money paid to the use of his principal, he must prove an actual payment in satisfaction of the debt.

In order to get the benefit of the security, upon payment of the debt, he must have it assigned to a trustee; or if bound collaterally, he may take the assignment directly to himself.

If an assignment of the security is taken, the surety may have his redress upon it immediately in the name of the creditor.

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would fall with it. He cannot indeed take the assignment, in that case, to himself, for that would be an extinction of the judgment. But he may take it to another person. In law, the plaintiff alone is the owner of the debt. The assignee can act in his name alone. And a court of law can take no notice of the trust, upon which the assignee or the plaintiff keeps up the judgment. But if we could, we would not make the legal right unite with that of the *cestui que trust*. It is like the owner of an inheritance taking a conveyance to a trustee of an outstanding satisfied term. The interposition of the trustee keeps the legal and equitable estates apart, even in equity—much more at law.

There is no doubt that *McArthur* may yet acknowledge satisfaction of record, or the assignee may do it in his name, provided the terms of the assignment authorize it. But until that be done, or the judgment be otherwise discharged, in such wise as to bar a suit on it at law, it remains in force. While it does, the surety cannot maintain an action, of which the *gist* is the satisfaction of that judgment.

But while it is in force, the surety cannot maintain an action for the money paid for the assignment.

This opinion renders it unnecessary to decide the other questions. But there is one of them of very general consequence, which may frequently occur, on which all the judges entertain a clear opinion, different from that given in the Superior Court, which we think it proper to express. It relates to the commissions of the executor. We think the acts of 1715, 1723 and 1799, taken together, clearly contemplate that commissions, to be retained against a creditor or legatee, (which were not chargeable at all at common law,) must be allowed *by the court*, before which the executor is to return an account of his administration, or in which is pending a suit directly for the settlement of those accounts. A just allowance can be made only upon an examination of the accounts. It is impossible that a jury can, in this collateral way, have the information necessary to a proper estimate. Besides there is another reason of policy which forbids it. The account current is to be returned on the oath of the exetor. It is frequently important evidence for the credit-

An executor cannot retain his commissions against a creditor or a legatee, until they have been allowed by the County C'rt, or in a suit for the settlement of his accounts.

They cannot be allowed by a jury upon the plea of fully administered.

or upon the issue of fully administered. The administration is often within the knowledge of the executor alone. In England, he may at any time be summoned by the creditor before the ordinary to render his account, which the creditor uses as evidence in the suit at law. Here the only method we have of obtaining such an account is to withhold the allowance of commissions, until it be returned. The refusal of them, until expressly allowed by the court, will make it the interest of the executor to do his duty, and make fair disclosures. The rule can never be of any importance, except in the case of estates alleged to be insolvent. Whenever that is alleged by the executor, he must of necessity be prepared to exhibit his accounts; for when the estate is exhausted, he has nothing further to administer, and must be ready to return the account current. We think therefore, that an executor in default, in not making his return, is not entitled to retain for commissions at the discretion of a jury. They only form a charge against the estate, when specifically allowed by the court upon the settlement of the estate.

Wherefore the judgment must be reversed, and judgment (according to the agreement of the parties in the record) of nonsuit entered.

PER CURIAM.—JUDGMENT REVERSED.

ABNER WILLIAMS v. WILLIAM WOODHOUSE, *et al.*

The plaintiff cannot recover in case for a malicious prosecution without producing the record of his acquittal.

The plaintiff declared as follows:

"And the said *Abner* complains &c. that heretofore "&c. they the said *Woodhouse* and *Salyear* together with "other persons &c. did conspire, combine, confederate "and agree to accuse and charge the said *Abner*, together "with *J. P.* and *W. G.* of a conspiracy, to cheat and "defraud the said *William Woodhouse* of one half of a

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"vessel, called &c. and to give and procure evidence a-
"gainst said *Abner, J. P.* and *W. G.* sufficient to con-
"vict them of the said charge, and to cause them to be
"indicted for the same charge so unjustly and falsely to
"be made by them the said *Woodhouse* and *Salyear*, a-
"gainst them the said *Abner, J. P.* and *W. G.* in the
"Superior Court &c. and cause them in such court to be
"convicted on their trial. And the said *Abner* saith,
"that the said *Woodhouse* and *Salyear* did at &c. in pur-
"suance of the said corrupt agreement and conspiracy,
"cause the said *Abner* together with the said *J. P.* and
"*W. G.* to be indicted, and him, the said *Abner*, to be
"convicted for a conspiracy &c. and did appear and
"give evidence, and procure evidence to be given against
"the said *Abner*, whereof he was convicted, and suffered
"much by long imprisonment and loss of money; altho'
"at the same time it was well known to the said *Wood-*
"*house* and *Salyear*, that the said charge so made was
"false and unfounded, and the said *William Woodhouse*
"was not at that time, and never was the sole owner of
"said vessel, &c."

Upon *not guilty* pleaded, the jury, before DONNELL, Judge, at Pasquotank, on the last spring circuit, found a verdict for the plaintiff. Upon the motion of the defendant's counsel, his Honor set the verdict aside, and directed a nonsuit to be entered; because it was admitted by the plaintiff that he had been convicted of the offence, for which he averred he had been maliciously prosecuted.

From this judgment the plaintiff appealed.

Iredell, for the plaintiff.

Kinney, contra.

HALL, Judge.—From the finding of the jury in this case, it may be that the judgment we feel ourselves bound to give, will not accord with the justice of the case. Admitting that however to be the case, it is better that the injury be submitted to, than that a wholesome and well established rule of law should be shaken.

Judgments are the solemn determinations of judges upon subjects submitted to them, and the proceedings are

recorded for the purpose of perpetuating them. They are the foundations of legal repose. It is stated by *Lord Mansfield* in *Moses* v. *McFerlan*, (2 *Bur.* 1005,) that the merits of a judgment can never be impeached by an original suit either at law or in equity; that the judgment is conclusive as to the subject matter of it whilst it is in force, and until it is reversed or set aside. So it is stated in 1 *Stark. on Evid.* 224, that the record of a judgment in a criminal case is conclusive evidence of the fact of conviction and judgment, and all the legal consequences resulting from it. It is in the nature of a judgment *in rem*.

Judgments cannot be impeached collaterally; and while they are unreversed, they are conclusive as to their legal effects.

When an action is brought for a malicious prosecution, it is indispensable that the plaintiff should not only show forth the record of the prosecution, but also by the same record, his acquittal of the charge made against him. (2 *Stark. on Evid.* 906). If he cannot do this, he must fail in his action. So likewise must he fail, if he shows forth a record, which shows a verdict and judgment of conviction. That judgment is evidence of his guilt, whilst it is in force.

But the plaintiff denies that this is an action for a malicious prosecution, in the limited, technical meaning of that action; but an action on the case in its extensive meaning, complaining that the plaintiff sustained damages in being convicted of the crime of conspiracy, thro' the agency of the defendants, and by their conspiracy. He admits the lawfulness of the conviction, but says it was procured by the perjury and conspiracy of the defendants.

The plaintiff certainly confines himself to very narrow limits. He suffered under that judgment, but he admits its legality. He only complains of the conspiracy and perjury of the defendants. If their conspiracy and perjury, admitting them to be guilty of them, are considered as unconnected with the judgment and the effects of the judgment, they are offences of a public nature. They may be punished for them by indictment. But keeping the judgment out of view, they have not injured the plaintiff either in person or in purse. Let the case be disguised as it may, it is an action brought for an injury

And where the defendant in an indictment was convicted of the charge, he cannot in any form of action recover against the prosecutor, altho' he shows that the conviction was the result of conspiracy and perjury.

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sustained by that public prosecution; and as long as the plaintiff's guilt is established by the judgment in that prosecution, so long must he be without a remedy.

PER CURIAM.—JUDGMENT AFFIRMED.

BENJAMIN BULLOCK v. EDWARD BULLOCK *Ex'r. of* MICAJAH BULLOCK.

Where *non assumpsit* and the *statute of limitations* are pleaded, and the jury find the general issue for the defendant, this court will not examine the charge of the judge on the plea of the statute.

The case of *Morisey* v. *Bunting*, (*ante* 1 *vol.* 3,) approved.

This was an action of ASSUMPSIT, tried at Granville, on the last circuit, before NORWOOD, Judge.

Pleas—*general issue* and the *statute of limitations*. The plaintiff excepted to the charge of the judge upon the plea of the statute of limitations. The jury returned the following verdict: "that the defendant's testator did not assume." Upon this verdict judgment was rendered for the defendant, from which the plaintiff appealed.

Devereux, for the plaintiff.

No counsel appeared for the defendant.

RUFFIN, Judge.—The court is precluded from considering the judge's charge by the verdict on the general issue. It is found by the jury that the defendant's testator did not assume; which puts the other issue, on the statute of limitations, and the instructions of the Superior Court on it out of the question. As the existence of the debt is negatived, the judgment must of course be affirmed. To this *Morisey* v. *Bunting*, (*ante* 1 *vol.* 3,) besides other cases, is a direct authority.

PER CURIAM.—JUDGMENT AFFIRMED.

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DEN *ex dem. of* GEORGE BLAIR *v.* ELISHA P. MILLER.

A note given for the payment of rent, and proved by the subscribing witness to have been executed thirty years *ante litem motam*, is competent evidence to prove the date of the lessee's possession. But it is otherwise as to a recent admission of the lessee.

After the new trial granted in this cause (*ante* 2 *vol.* 407) it came on to be tried again before his Honor Judge DANIEL, at Burke, on the last circuit; when the only question was, as before, whether *Greenlee*, under whom the defendant claimed, had a seven years possession, so as to perfect a paper title originally defective. To establish the commencement of *Greenlee's* possession, the defendant offered a note given for the rent of the land, signed by one *Elrod* and dated in the year 1800; and proved its execution by the deposition of the subscribing witness. No objection was made to the note going to the jury—and a verdict was returned for the defendant, when the plaintiff moved for a new trial because the note was improperly read. His Honor discharged the rule, and gave judgment for the defendant, and the plaintiff appealed.

Seawell and *Gaston*, for the plaintiff.

Badger, *contra*.

HALL, Judge.—Slight mistakes in offering evidence to a jury, and in the examination of witnesses, particularly when not objected to at the time, are not, generally, sufficient reasons for setting aside verdicts, upon objections taken for the first time after the verdicts are recorded.

In the present case however, it does not appear that any mistake has happened. The note was read for no other purpose than to fix the time, from its date, when *Elrod* took possession of the land for which this suit is brought, in order to make out a seven years possession. The note was given by *Elrod* in the year 1800, and its execution proved by the subscribing witness. It cannot be believed that it was *then* given by *Elrod*, to furnish evidence *at this day*, that *Elrod* was tenant of the land

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at that time. The strong presumption is otherwise. I admit that an acknowledgment of the note by *Elrod* of recent date would not be sufficient.

I think there is not the smallest pretence for granting a new trial.

PER CURIAM.—JUDGMENT AFFIRMED.

DEN *ex dem. of* EDMUND McLINDON v. GIDEON B. WINFREE.

Where a deed was proved, and before its registration the boundaries of another tract were inserted in it, it was held that evidence of that fact did not impeach the deed, but that as to the tract, the boundaries of which were inserted after probate, the deed was unregistered.

EJECTMENT tried before STRANGE, Judge, at Anson, on the last circuit.

The plaintiff claimed title under a judgment, execution and sheriff's deed; and having made out his case, the defendant offered to prove by the sheriff, that the land in dispute had been sold with several other tracts—that by mistake it was not inserted in the deed until after its probate, and the order for its registration; and that then, the mistake having been discovered, the sheriff, at the request of the purchaser, inserted the land in question in the deed—when it was registered without another probate. The plaintiff objected to this testimony, but his Honor received it; and the sheriff upon his examination fully supporting the defence, the plaintiff was nonsuited and appealed.

No counsel appeared for either party.

HALL, Judge.—I think the testimony of the sheriff in this case was properly received. It was not the reception of parol evidence to destroy or alter a deed, but to support it, and to preserve it from contamination, by preventing matter *dehors* the deed from creeping into it. The deed shown forth in evidence by the plaintiff has been acknowledged in court and registered, and includes the land su-

ed for, and to all appearance conveys title to it; when in fact there never was any acknowledgement or order of registration, as far as relates to that land; and it is to rescue the deed from the burden of that falsehood, that the testimony is received. When that is done, the deed is placed in its original shape, and like other deeds is unassailable by parol evidence. To say the least of it, tho' probably there was no injury intended to be done to any one, the conduct of the sheriff was very reprehensible in making the insertion after he had acknowledged the deed in court.

It may be said that the plaintiff has a deed for the land; but that deed has been neither proved or acknowledged in court, nor registered.

PER CURIAM.—JUDGMENT AFFIRMED.

ARTHUR MORROW *et al. v.* WILLIAM WILLIAMS.

A remainder n chattels, after a life estate, cannot be created by deed.

DETINUE for a slave, tried on the last circuit, before his Honor, Judge NORWOOD. A verdict was taken for the plaintiff, subject to the opinion of the court upon the following case:

Jemima Bradshaw, on the 30th of December, 1820, signed an instrument of which the following is a copy:

"To all people to whom these presents shall come: I "*Jemima Bradshaw*, for and in consideration of the na- "tural love and affection, which I have and bear to my "beloved son-in-law *Arthur Morrow*, and my daughter "*Jemima Morrow*, and for divers other good consider- "ations me hereunto moving, have given and granted, "and by these presents do give and grant unto the said "*Arthur* and *Jemima Morrow*, my negro boy *Abraham*," &c. (mentioning several articles of personal property) "to their use, and to use singularly to them, and the "children of *Jemima Morrow*, that she may have by her "said husband, to enjoy full power and possession of af- "ter my death, to have and to hold and enjoy all and sin-

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"gularly the said negro boy *Abraham* &c. unto the said "*Abraham* and *Jemima* and their children. In witness "whereof &c.

JEMIMA BRADSHAW.

"Signed in presence of &c."

The plaintiffs were the wife of *Morrow*, and the children born at the date of the paper above set forth.

The plaintiffs moved to amend the writ, but his Honor being of opinion that they could not recover upon the merits, did not notice the motion. The verdict being set aside and a nonsuit entered, the plaintiffs appealed.

Winston and *W. A. Graham*, for the plaintiffs.

No counsel appeared for the defendant.

HALL, Judge.—Several valid objections occur to the claim of the plaintiffs.

A gift of slaves, made by an instrument not under seal, and unaccompanied by delivery, is void.

The first is, that the gift is not established by a deed, or in its absence by evidence of a delivery; the writing introduced and relied upon, not being under seal, is nothing more than the declaration of *Jemima Bradshaw*, that she gave the negro to her daughter and son-in-law; but there having been no delivery, no title vested in them, and there being no valuable consideration, no right of property passed from her.

Another objection is, that supposing this writing conveyed the title of the negro, only a remainder is given by the donor, after the expiration of her own life. She gives the negro in appropriate words enough, but adds these words, "*to enjoy full power and possession of after my death.*" Now it has been held in repeated decisions, that such a remainder in personal chattels cannot be created by deed. (*Gilbert* v. *Murdock*, 2 *Hay.* 182. *Nichols* v. *Cartwright*, 2 *Mur.* 137. *Graham* v. *Graham*, 2 *Hawks* 322. *Sutton* v. *Hollowell*, *ante* 2 *vol.* 185. *Foscue* v. *Foscue*, 3 *Hawks* 538.) The doctrine may therefore be considered as settled.

The cases of *Gilbert* v. *Murdock*, (2 *Hay.* 182,) *Nichols* v. *Cartwright*, (2 *Mur.* 127) *Graham* v. *Graham*, (2 *Hawks* 322.) *Foscue* v. *Foscue*, (3 *Id.* 538) and *Sutton* v. *Hollowell*, (*ante* 2 *vol.* 185,) approved.

But laying these objections out of the case, another might be taken. If the title to the negro passed by the writing, it vested in *Jemima* and *Arthur Morrow*, and not in their children. A use only was declared to them, and

they ought not to be plaintiffs. The record shows, that a motion was made to amend the writ by striking out, probably to remedy that mistake. But it does not appear what became of it.

These objections arise upon the record, and appear to me to be fatal. I therefore think judgment should be given for the defendant.

PER CURIAM.—JUDGMENT AFFIRMED.

HILL & NALL *v.* SAMUEL CHILD.

Where the sheriff has two writs of *fi. fa.* in favor of the same plaintiff, one against a principal debtor alone, and another against the same debtor and a surety, and raises money by a sale under both writs, it is to be applied *pro rata* to both; and neither the sheriff nor the plaintiff can, by a subsequent application, affect the right of the surety to have the judgment against him discharged *pro tanto*.

At August term, 1829, of Orange County Court, the plaintiffs obtained a judgment against *Thomas Clancy* and *James Child* for $979, and also against the same persons together with the defendant as their surety, for the sum of $3283. Writs of *fi. fa.* issued on each of these judgments, returnable to February term, 1830, which were levied upon the property of the principal debtors. Writs of *venditioni*, with clauses of *fi. fa.* issued, returnable to May term following, upon which the sheriff returned that he had made the sum of $3212; and the plaintiff's attorney gave him a receipt for $2600. stating it to be in part satisfaction of two executions in favor of the plaintiffs. *Alias* writs of *venditioni exponas*, with clauses of *fi. fa.* then issued, upon which was made the farther sum of $606. After the return of these writs, the sheriff being about to pay the residue of the $3212 made under the writs returnable to May term, and also this sum of $606, to the plaintiff's attorney, was informed by him, that he should apply the payment first to the satisfaction of the small execution, and the residue as far as it would go to the large one to which the defendant, as surety, was a

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party. This application was objected to by the defendant, who insisted that it should be applied *pro rata*, to both executions. The sheriff stated that he was desirous the money should be applied in a manner to release him from responsibility to either of the parties; and subsequently, the attorney of the plaintiff received the money from the sheriff, and gave him a receipt therefor, stating it to be in full satisfaction of the small execution, and in part satisfaction of the large one. Another *fi. fa.* issued on the large judgment, and the property of *Thomas Clancy* and *James Child* being exhausted, it was levied upon the goods of the defendant who paid $715, alleging that the application by the plaintiff's attorney was improper, and that the sum then paid by him was in full of the balance due upon that judgment. If the application made by the attorney was proper, then $200 was still due upon the judgment.

The foregoing facts were stated upon a motion to the County Court, made by the plaintiffs, to issue another execution. But the motion was overruled and the plaintiffs appealed.

His Honor, Judge Swain, on the last circuit, affirmed the judgment of the County Court, and the plaintiffs appealed to this court.

W. H. Haywood, for the plaintiffs.

Badger and *Winston*, for the defendant.

Ruffin, Judge.—If the money raised upon the two executions is to be applied to each in proportion to the debt, that in which *Samuel Child* is a defendant is satisfied thereby, and by the payment of the sum of $715, afterwards made by him. The creditor contends, that his execution against the two shall be first satisfied, so as to throw the whole unpaid balance upon the other.

No authority has been adduced in support of the position; nor do I perceive any principle on which to place it

It is not the question, what the creditor might have done, or the sheriff. But the controversy is, what is the effect of what has been done by each of them. No doubt

the creditor could have enforced the entire satisfaction of the small debt by withholding his larger execution, until that was done. And there is no doubt also, that after both were delivered to the sheriff, that officer might have proceeded to satisfy the whole execution against the three, out of the property of *Samuel Child*, and thereby left the estate of the other two open to the other writ. This indeed places a discretionary power in the sheriff's hands; according to the exercise of which, the one debt will be wholly or partially satisfied. This is necessarily so, where the one writ is against one person, and the other against that person and another; for each defendant is liable for the whole. And it is a power which the party cannot control by directions. The officer is govered by the mandate and force of the writ. But the sheriff may first seize and sell, under both writs, the estate of him who is defendant in both. If he does, the estate of him who is defendant in but one is liable only for the balance due upon that execution, after the legal application of the money before raised. The question then is, what is a due application of that money?

If the two executions were at the suit of different plaintiffs, (on which, by the way, the sheriff has the same discretionary power as that above mentioned,) there is no doubt that each would be entitled to its share of the money. I can discover no difference, where there is the same plaintiff in both. The writs create certain well known liens, and entitle the plaintiff, where there is conflicting process, to certain portions of the money raised upon the two jointly. If the sheriff seize only the estate of him who is defendant in both, and each has an equal lien, and is entitled to a proportion of the fund, and sell that estate; the seizure and sale satisfy both writs *pro tanto*. If the sheriff thus apply the money, what complaint has the plaintiff? If they are different persons, manifestly none; for he whose execution is only against one gets his share of *his debtor's* estate. If there be the same plaintiff, he has as little; for the estate of him who is the debtor in both has been applied to each as the law directs; and the balance upon the execution against that

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defendant and another is satisfied out of the estate of the latter. There could be no action against the sheriff for thus dividing the money raised on both, out of the effects of him against whom both run. But if directions from the party could control, there were none here; and the sheriff appropriated the money by his return. The subsequent act of the plaintiff, even with the sheriff's assent, could not alter it; because the writ was already satisfied *pro tanto*. It is true of debts generally, that the creditor may apply the money, if the debtor does not direct a special application, to which of the two debts he chooses. But the very act of raising money on an execution is an application of it to that debt, according to the legal effect of the execution. I say raised on it, because, as I have already remarked, the sheriff *may*, where an execution is against two, satisfy it out of the estate of either. But the creditor, who has two debts, can keep the control of both in his own hands, only by holding up one of the executions. If he deliver both, he places it in the power of the sheriff to act upon both, against the property of him who is defendant in both; and the money levied on both is equally applicable to both; indeed is applied in the very act of raising it.

PER CURIAM.—JUDGMENT AFFIRMED.

PHILIP CANSLER v. JOHN HOKE *et al.*

The return of a processioner must set out the courses and distances in words at full length. And where the courses were expressed by abbreviations, and the distances in figures, the return was set aside. HENDERSON, C. J. *dissentiente.*

The plaintiff sued out in the County Court, an order for the processioning of five acres of land lying in Lincoln, adjoining the lands of the defendants, to which the processioner returned that he had run several lines, and had been forbidden by the defendants from proceeding further with the survey. Upon this return, the County Court under the act of 1799 (*Rev. c.* 541) appointed five

freeholders to complete the processioning, who made their return setting forth the courses in abbreviations, thus—n. for north &c.—and the distances in figures instead of words. The defendants objected to the return, but it was confirmed by the County Court, from which the defendants appealed.

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His Honor, Judge DANIEL, on the last circuit, affirmed the judgment, and the defendants again appealed.

Gaston, for the defendants.

The Attorney General and *Hogg*, for the plaintiff.

HALL, Judge.—When I observed, that the first act on processioning which is to be found in the Revisal, (c. 14,) declared, that any person whose lands were twice processioned according to that act, shall be deemed and adjudged the sole owner of such land, and that it was supposed that clause gave a title to lands which might be twice processioned under the act of 1792, (*Rev. c.* 365,) I could not but consider it as a proceeding fraught with danger to the rights of land proprietors, and felt myself altogether justified in throwing every legal impediment in the way of a title, thus to be consummated. I was prepared to say, that the processioner's return in this case was not made out according to the 6th section of the act of 1792, (*Rev. c.* 365,) which declares, that "the processioner shall make out a certificate in words at full length, for each tract by him processioned;" an objection, which I should be at a loss how to get clear of in cases of minor importance. The act is imperative; and the processioner's certificate is not made out in words at full length. And for that reason the report must be set aside, with leave to the plaintiff to proceed further in the cause, as the law directs.

It is to be observed, that the act of 1823, (*c.* 14.) directs that lands shall be processioned, and the marks renewed once in every three years. And that he, whose lands are twice processioned, shall be adjudged the sole owner of such lands. The act of 1792 leaves every person at liberty to have their lands processioned or not. If they elect to have them processioned, no particular

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time is stated in which it is to be done. They may have them processioned to-day, and again to-morrow. And the doubt may be very honestly entertained, whether that is such a *twice processioning*, as will give a good title. The present case does not require an opinion to be given on this point.

RUFFIN, Judge, concurred.

HENDERSON, Chief-Justice, *dissentiente*.—I cannot but believe, that the words *at full length*, to be found in our processioning acts, are fully satisfied by abbreviations, not only of common, but I believe I might say of universal use: as N. for North, E. for East, W. for West, *po.* for poles, *chs.* for chains, when it is shown by the context, that these abbreviations are used as descriptive of the courses and distances. There can be in such case no possibility of a mistake. In our acts, describing the mode in which surveyors shall make out and return plats of vacant lands, made upon entries, the words are "*words at length.*" And surely there can be no substantial difference between words *at length* and words *at full length*. Yet this interpretation would render nearly all of our surveys void. And thereby also, our grants would be annulled. The legislature meant, that as the thing was to be done in words, and frequently for the use of plain and unlearned men, the proceedings should be so described, that all could understand them. I must therefore declare my dissent from the opinion of the court, for I think that the proceedings should not be quashed.

PER CURIAM.—JUDGMENT REVERSED.

SIMON GENTRY *v.* CHRISTOPHER WAGSTAFF *et al.*

The husband acquires by marriage no estate in the land of his wife, of which he is not actually seised. And where the wife has a vested remainder in lands, a sale, in the life time of the particular tenant, of the husband's interest passes nothing to the purchaser.

This was a petition for PARTITION. The demandant averred, that *John Baird* being seised of the land of which

partition was sought, devised them to *John Kerr* and his wife *Margaret*, for their joint lives, with remainder to the issue of the wife—that the wife died leaving several children, and among them *Margaret*, the wife of the defendant *Wagstaff*—and that the demandant had purchased the interest of *Wagstaff* at an execution sale.

The defendants pleaded, that at the sale of the interest of *Wagstaff* in the land, *John Kerr*, the tenant for life, was alive—and the demandant demurred.

His Honor, Judge NORWOOD, at Person, on the last circuit, overruled the demurrer, and dismissed the petition, whereupon the demandant appealed.

P. H. Mangum, for the demandant.—The judgment of the court in this case, depends *solely* upon the question, whether *any interest* passed to the petitioner, by virtue of the sheriff's sale under the execution, set forth in the petition and admitted by the plea.

No analogies from the English decisions can be expected in this case; because in England, land could not be sold as in this state, under a *fieri facias*. Nor is this case analogous to an execution sale of personal property; because, to render a sale of personal property by virtue of an execution *valid*, the chattel to be sold must be either in the actual or potential possession of the officer, so as to enable him to give possession of it to the purchaser; and so as to enable the bidders present, by inspection of the property, to judge of its probable value, and thereby prevent an injurious sacrifice in the sale of it. Not so, in the case of the sale of *land* by execution; for among other reasons, it may suffice to say, that *land* being immovable cannot be delivered to the purchaser by *manumission*; and it being subject at all times previous to the sale, to the observation of such as may wish to purchase it, a public sale of it as the law prescribes, will not *probably* produce a sacrifice in the value of it, or afford facilities to the commission of fraud upon those who may be interested in its selling for a good price. But it is contended, that this cause depends upon the true construction of the British statute of the 5th of *George 2d c. 7*, and upon the interest which a husband acquires in his

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wife's real estate by their intermarriage. What is the proper construction of the statute of *George* 2d? It is contended, that by virtue of that statute, every description of *legal interest*, which a debtor may have in or to land, is subject to be sold under execution. Some *equitable interests* have been rendered subject to sale by execution, by the General Assembly. But they do not affect this case. If the construction of the statute of *George* 2d I contend for, be correct, it will not be necessary to call in any other aid, so far as this part of the case is concerned, than what that statute affords. The position then which I assume, is, that *any legal interest whatever*, which a debtor may have in and to land in this state, is liable to be sold under and by virtue of a *fieri facias*.

The next inquiry is, what interest did *Christopher Wagstaff* acquire by his intermarriage with a daughter of *Margaret Kerr*, in the land devised by *Baird*, to *John Kerr* and his wife during their joint lives and the life of the survivor, with remainder in fee to their children? The interest which the wife of *Wagstaff* had in the land devised *in the life time* of her mother, was, according to all the authorities, *a vested remainder in fee* in an undivided part. What sort of *an interest* is a vested remainder in fee? Is it a legal, or an equitable interest? I apprehend it is clearly *a legal interest*. It is one that is recognized, and has ever been recognized by courts of law. Was this interest *a freehold interest*, as well as a legal interest? It is called *a freehold remainder*. (2 *Bl. Com.* 166). The interest then which *Mrs. Wagstaff* had in the land devised *in the life-time* of her mother, may be denominated a *freehold, legal interest*—for every *fee simple* is a *freehold* estate, whether it be in possesssion or remainder. *Margaret Kerr*, clothed with this freehold, legal interest, intermarries with *Christopher Wagstaff*. Does not *Wagstaff* acquire *some* estate or interest in this land, by his marriage "*ipso facto*"? If he acquires any interest, it must partake of the character of his wife's estate therein. *That* was a *legal* interest; and if he has *any* by virtue of his marriage, the interest thus acquired must also be a *legal* interest. For I am yet to learn that

in *any possible case*, the husband can acquire in his wife's estate, by virtue of his marriage, rights of a different character from those of his wife in the same estate at the time of marriage, so far as regards the distinction between legal and equitable interests. The question recurs—did *Wagstaff* acquire *any interest* in this land by virtue of his marriage? If he did not, I will venture to assert, that this case constitutes an *anomaly* in the law, unsupported by authority and contradicted by legal analogy. I grant, the estate which *Wagstaff* acquired *was not* a "tenancy by the curtesy." Why? Because among others, to constitute such an estate, *two things* are essential which are wanting in this case, viz: a *seisin in deed* of the land on the part of the wife, and *the subsequent birth of living issue*. Neither of these facts are, in this case, pretended. The wife of *Wagstaff*, at the time of her marriage, was not *seised in deed* of the land; because *one* of two life-estates created by the will of *John Baird*, had still to fall; and the surviving tenant for life had the actual possession in deed. But at the time of her marriage, she had a *seisin in law* of a *vested remainder in fee*, which is not a bare right or possibility, but a *substantive estate*, upon which a release will operate. (*Co. Litt.* 267, *a.*) And this, I contend, was a sufficient *seisin*, within the meaning of the authorities and according to the reason of the law, to confer on her husband an estate in right of his wife, by virtue of his marriage "*ipso facto*." Suppose that in this case, *Margaret Kerr* had been *seised in deed* of an undivided child's part in this land, at the time of her marriage—or in other words, suppose that her mother as well as her father had died previously to her marriage. What estate would her husband *then* have acquired by the marriage "*ipso facto*"? It would not have been "a tenancy by the curtesy"; but it would have been a *freehold* estate—an estate of as high dignity in legal estimation as that by "the curtesy." It would have been a *freehold estate in right of his wife*, that would have continued as long as *the coverture*—as long *as their joint lives*. It would *necessarily* have had that duration, and may have continued *longer* by the subsequent birth of a

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living child in the life-time of the wife. (*Co. Litt.* 2 *vol.* 351 *a*, and *Reeve's Dom. Rel.* under *rights of husband in wife's real estate*, and references). I have supposed the case of a *seisin in deed* on the part of the wife; but I argue that *such* "a seisin" is not necessary to confer on the husband *such an estate in right of his wife as I have described*, although it is necessary to constitute "a tenancy by the curtesy." Why? Because in the first place, the authorities are silent on the subject of a *seisin in deed*, when treating of the estate the husband gains in the wife's land by *the fact* of the marriage. They speak of "a seisin" *only* on the part of the wife; which is a term of art and is *civil* or *natural*, or *in law* or *deed*, (*Co. Litt.* 200, *b.*); whereas, on the other hand, when treating of a tenant by "the curtesy," they *expressly* state that a *seisin in deed*, in contradistinction to a *seisin in law*, is necessary to constitute it. And secondly, "a seisin in deed," in such a case, is not necessary, because the policy of the law does not require it; but on the contrary, the policy of the law is otherwise. Why does the law require "a seisin in deed" on the part of the wife, as *one thing essential* in constituting "a tenancy by the curtesy"? If there be any reason for it, I apprehend it is, to stimulate the husband to an industrious improvement of his wife's real estate, and thereby add to the physical strength of the country by increasing its wealth; which could not be done unless he possessed himself of her real estate. "A tenancy by the curtesy" is a *preferable* estate to that acquired by *the fact* of the marriage—although it is not one of a higher dignity, both being *freeholds*; and hence the law supposed, that by bestowing on the husband this additional boon *conditionally*, its policy in this respect would more certainly be promoted. No such reason applies to the estate which the husband gains in his wife's lands by *the fact* of her marriage; nor can any *adequate* reason be assigned for requiring in such a case, "a seisin in deed." The policy of the law does not require it. Why? By the law of the country, a man, by marrying, becomes responsible immediately to pay all the debts of his wife, without refer-

ence to the amount of the estate which she may bring to him. This stern, inflexible rule of law would frequently expose the husband to great inconvenience and loss, if the law did not at the same time, throw around him the panoply of its protection, by giving to him *an available* interest in all his wife's property. This, I contend, it does.

To apply this supposed policy of the law, which is certainly sound, to this case, and what will be the result? *Christopher Wagstaff* marries *Margaret Kerr*, who is seised of a vested remainder in fee in an undivided part of a tract of land; he, by *the fact* of marriage, is bound to pay her debts; and the law, to enable him to do so, gives to him at the same time, an interest in this vested remainder which will *necessarily* continue during the coverture, and may *possibly* continue *longer*. This interest must be *available;* otherwise, it would be nugatory. Again, it will not be denied, I presume, and and no authority need be cited to prove the truth of the position, that if *Wagstaff*, after his intermarriage with his wife and before the death of the tenant for life, had executed a deed of bargain and sale for a valuable consideration, purporting to convey all his interest, in right of his wife, in her vested remainder in fee in an undivided part of the land devised; he, *Wagstaff* and wife, after the death of the tenant for life, could not have recovered possession of the land, against his grantee. Why? It matters not, whether it be because he had previously conveyed his interest in right of his wife, by the deed of bargain and sale, or because he would be *estopped* by his deed, purporting to convey. Either would be sufficient to bar his recovery. And the same consequences, I contend, would ensue from the sale of his interest under an execution, as stated in the petition. The judgment and execution, under which the sale was had, and the sheriff's deed, *at the very least*, would *estop* him from denying the title of the plaintiff in this cause to the premises in question; and that too, whether *Wagstaff* and wife were either plaintiffs or defendants. The plaintiff, by force of his purchase at the execution sale, set forth in the peti-

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tion, is placed in the shoes of *Wagstaff* to every intent and purpose, to the extent of the present claim; and neither *Wagstaff* and wife, nor the other defendants, can successfully resist this petition. And this is true in this case, whether the execution sale actually conveyed to the plaintiff the estate, as it is contended it did, or whether the judgment, execution and sheriff's deed operate on *Wagstaff* and wife by estoppel *only*. For the plea is a joint plea, and is good as to all, or bad as to all the defendants.

W. A. Graham, for the defendants, argued that the wife must be actually seised, and not merely in law, to entitle the husband to his curtesy; and that *seisin* denoted the completion of that investiture, by which the tenant was admitted into the estate, and without which a freehold could not be constituted; and he cited, *Taylor* v. *Hoode*, (1 *Bur.* 107.) 2 *Bl. Com.* 127. 2 *Kent's Com.* 110. 4 *Id.* 29. *Preston on estates*, 215. 2 *Bacon's Ab.* 224. *Thomas Co. Lit.* 646, and 672. *De Grey* v. *Richardson*, (3 *Atk.* 469.)

HENDERSON, Chief-Justice.—When this case was opened, my impression was, that as the interest of the wife was a vested remainder in fee, after an estate for life in her parents, and was therefore incapable of a seisin either in deed or in law, the law cast an estate on the husband during the marriage, which he could himself alienc, and which could consequently be sold for his debts. I was led to this conclusion from cases, which I then thought analogous; to-wit, where the estate was incapable of an actual seisin, as in cases of advowsons, rents and other incorporeal hereditaments; that the law gave them to the husband during the marriage, and upon the death of the wife, having had issue born alive, he became tenant by the curtesy thereof; and that upon the death of the wife, her heir succeeded to her estate or interest therein, without an actual seisin by her. But upon reflection I am satisfied that all these analogies fail. That as regards the freehold interest of the wife, the husband by the marriage alone can acquire no estate or interest; and that there must be an actual seisin of the husband, during the marriage, of such estates as ad-

mit of it; as in lands and other corporeal hereditaments; and in both corporeal and incorporeal estates a *present interest*. I confine myself to freehold interests. This rule is founded, I think, on feudal reasons; and although the doctrine of feuds has in a great measure been abolished, still many of the rules growing out of it remain, and govern our real estates, and this among others. The reason, why in freehold interests there must be a present estate in the wife to give the husband an interest, arises from the principle of the feudal law, that it is the freeholder only, who is bound to perform the feudal duties; and that as the functions of the government could not otherwise be carried on, (as the feudatory was concerned in the making and administration of the laws, as well as the defence of the kingdom,) there must in every feud be a freeholder. For if one feud could be withdrawn from the obligations by law imposed on it, all might; and thereby the functions of the government would entirely cease. Hence the rule, that the freehold could not be in abeyance, or in no one; and hence grew the rule, that a contingent freehold remainder must be preceded by a particular freehold estate. But no such rule prevailed with the residue of the inheritance. It might be in abeyance, in uncertainty, or as is expressed by some, *in nubibus*. All that was required was, that there should always be a freeholder to occupy the land, and answer for its duties. Where there was one, the ulterior limitations might be to uncertain persons, provided the uncertainty was removed before or at the time the person was wanted to fill the freehold. Hence the rule, that the contingent event, on which the remainder is to vest, must happen, or the contingent remainder man must be *in esse* during the particular estate, or *eo instanti* that it determines, that there may be no chasm. A child in *ventre sa mere* would not at common law fill the freehold, and make the contingent remainder good. Hence the law is entirely regardless of looking out the remainder man, until he is wanted to fill the freehold, and will not before that time decide on the person to take. As where there is an estate to A for life, remainder to B and his heirs; B dies living A; the

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heir of B is not looked for until the death of A. For until that time he is not wanted to fill the freehold; altho' B had a vested interest, and he who is the heir of B at A's death, and not he who is heir at B's death, succeeds to the estate. We had a remarkable application of this rule some years ago, in the late Supreme Court, in the case of *Exum* v. *Davie*. (1 *Murph.* 375.) An estate was limited to *Harwood Jones* for life, remainder to *John Jones* and his heirs. *John Jones* died before 1795, (when the act passed calling the females equally with the males to the inheritance,) leaving a son and a daughter. The son was then his heir, to-wit, at his death. After 1795, *Harwood Jones*, the tenant for life, died; at which time both the son and daughter were the heirs of *John Jones*; and they both succeeded equally to the estate. It was said to be quite immaterial who were the heirs of *John Jones*, as to these lands, when *John Jones* died. For there was a freeholder in the person of the particular tenant; and the law looked for the heirs, only when they were wanted to succeed to the freehold interest, which was on the death of the tenant for life. In the case before the court, the law does not look for the children of the tenants for life, until the estate of the tenants for life determines. For they were wanted for no purpose, and as the husband had no duties to perform in regard to the lands, the law gave him no interest or estate therein. I have confined myself entirely to freehold interests. As to chattel interests in lands, as terms for years, the doctrine of feuds does not apply, as they were unknown to the feudal law.

A sheriff can sell only such estates as the defendant in the execution can convey by deed passing an estate. Where the deed of the defendant would operate only by way of estoppel, a sheriff's deed conveys nothing

As to the argument, that the husband could have sold these lands by estoppel, so he might sell any other lands in the same way; but the sheriff can only sell what the defendant himself can sell, where his conveyance operates by way of passing or transferring an estate; not where it operates by way of estoppel. If it included sales operating by the latter mode, the sheriff might sell any tract of land, or all the lands in his county.

I have entered more at large into this case, from what fell from me, when it was opened. The authorities cited

and relied on by the defendant prove that there must be a present interest and a seisin of corporeal hereditaments. (*Taylor* v. *Hoode*, 1 *Bur.* 107. *Tho. Co.* 672, 582. 2 *Bl. Com.* 127. 2 *Bac. Ab. Curtesy, C.* 2, 3. *Preston on Estates*, 215.) It may therefore be said as universally true, that by the marriage the husband acquires no interest in the corporeal real estates of the wife until actual seisin; and therefore can have no interest in her real estates in reversion or remainder, dependant on or after a preceding freehold estate therein in another, until the determination of that estate, and a seisin in him.

PER CURIAM.—JUDGMENT AFFIRMED.

DEN *ex dem. of* JAMES SEAWELL v. BANK OF CAPE FEAR.

Sealing is necessary to the validity of all writs, except those issuing to the county of the court where they are returnable; and a sheriff by acting under an unsealed writ, does not thereby render it valid.

The cases of *The Governor* v. *McRae*, (3 *Hawks* 226) and *Barden* v. *McKinnie*, (4 *Id.* 299) approved.

EJECTMENT, tried on the spring circuit of 1830, before his Honor, Judge NORWOOD, at Cumberland.

The plaintiff claimed title under a sheriff's deed for the premises in dispute, dated June 2d, 1823, and reciting "an execution" which issued from the County Court of New Hanover, against *Peter Perry* and *Dominic Cazaux* for $662 90, and produced the record of a judgment against *Perry* and *Cazaux* entered up in New Hanover County Court, at August term, 1819, and a *fi. fa.* thereon, tested the 2d Monday of August, 1820, and returnable the 2d Monday of November following, which was returned levied upon the land in question, on the 11th of November, 1820, as the property of *Perry*, subject to sundry prior levies, made under executions issuing from Cumberland County and Superior Courts, at the instance of the defendants. The plaintiff also produced a *venditioni exponas* tested the 2d Monday of November, 1820, and

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returnable the 2d Monday of February, 1821, which recited the former levy, and upon which the sheriff returned that he had on the 9th of February, 1821, sold the land levied on under the *fi. fa.* to the lessor of the plaintiff.

The defendants objected that these writs did not confer upon the sheriff a power of sale; and to support the objection, produced the original *venditioni exponas*, and proved that it had never been sealed with the seal of New Hanover County Court, and urged 1st, that for this reason the writ was a nullity, and 2d, that as the sale took place after the return of the *fi. fa.* it was made without any authority in the sheriff, and consequently was inoperative. But his Honor overruled the objection, thinking that although the writ was not legally authenticated, yet if the sheriff thought proper to act under and recognize it, it warranted his subsequent sale.

The plaintiff also offered in evidence several judgments and executions in favor of the defendants against *Perry*, and proved that they were in the sheriff's hands at the time of the sale; and that the proceeds of the sale had been applied to their satisfaction; but it appeared that the agent of the defendants had directed the sheriff not to sell under these writs, although he had not withdrawn them, nor paid or tendered the sheriff his fees.

The defendants claimed title from *Perry* under an assignment of a mortgage, prior in time to the lien of the execution under which the lessor of the plaintiff purchased. This was impeached as fraudulent between the mortgagor and *Perry*, and a verdict being returned for the plaintiff, the defendant appealed.

Hogg, for the defendant, argued

1st. That a seal was absolutely necessary to every writ, which issued to a sheriff of a county other than that in which the court was held. (*Act of* 1797, *Rev.* c. 474, *s.* 5. *Governor* v. *Mellae*, 3 *Hawks* 226).

2d. He contended, that the rule laid down by the judge in the court below, in effect, gave the sheriff the power of deciding what was valid process and what was not; and of course, enabled him to determine the preference to be given to one of two executions; whereas his office was strictly executive.

3d. That if the writ of *venditioni exponas* was inoperative for want of a seal, the prior *fi. fa.* which had been returned at the time of the sale did not authorize it. (*Barden* v. *McKinnie*, 4 *Hawks* 279. *Amyett* v. *Backhouse*, 3 *Mur.* 63. *Ellar* v. *Ray*, 2 *Hawks* 568).

Gaston and *Badger*, for the plaintiff, argued

1st. That the want of a seal did not invalidate the *venditioni exponas*. If not sealed, the sheriff was excused from acting; but if he chose to act, a purchaser was not affected by the want of form. (1 *Archb. Pr.* 193, 324, *Gilb. Law of Evid.* 40. *Bull. N. P.* 234. *Peake's Evi.* 50. *Jackson* v. *Pratt*, 10 *Johns. Rep.* 387. *Cresson* v. *Stout*, 17 *Id.* 116).

2d. That a sheriff may sell land under a *fi. fa.* after its return, and without a *venditioni exponas*; and they commented upon the case of *Barden* v. *McKinnie*, and endeavored to show that it stood upon its peculiar circumstances, and that it was inconsistent with the cases of *Wheaton* v. *Saxton*, (4 *Wheat.* 503). *Toomer* v. *Purkey*, (1 *Se. Car. Cons. Rep.* 323). *Taylor* v. *Gaskins*, (*ante* 1 *vol.* 295.)

3d. That the plaintiff's title was valid under the execution in favor of the defendants, and cited *Haywood* v. *Hildreth*, (9 *Mass. Rep.* 393). *Prescott* v. *Wright*, (6 *Id.* 20).

HENDERSON, Chief-Justice.—A writ issued to another county must be under the seal of the court from which it issues. Without a seal it confers no power on the sheriff; and his acting under it cannot give it validity. This has heretofore been ruled in this court, in the case of *The Governor* v. *McRae*. The act of 1797, (*Rev. c.* 474, *s.* 5,) dispensing with the sealing of process in the cases mentioned in it, operates only in those cases. And it is a sufficient answer to say, that this is not one of them, and therefore must be governed by the general rule. But if that act has any effect in this case, it is to shew, that a seal is here necessary. For if by the general rule it was not, why make the exception?

It is next contended, that the levy under the *fieri facias* issued from New-Hanover County Court, and returned to

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the succeeding session of that court, levied on the lot in dispute, gave the power to sell; and that altho' this case may be embraced by the reasoning of the court in delivering the opinion in the case of *Barden* v. *McKinnie*, yet the facts are very different. There the indorsement of the levy was not made until long after the return of the *fi. fa.* the sale was not made until more than two years after its return day; and in the mean time the defendant in the execution had died. Here, the levy was indorsed at the proper time, the sale made shortly after, and in the life time of all the parties. It is admitted, that the case referred to is a much stronger one than this. But the principle is the same, to-wit, that a sale of lands under a *fi. fa.* is in virtue of a *power*, and not of a *property* in the thing sold. The latter is the case, as regards goods. By the seizure, the sheriff acquires a qualified property in them, and may maintain an action founded on that right of property, qualified to be sure, but still it is a right of property. He stands charged to the plaintiff in the *fi. fa.* for their value; and the debtor is discharged to the same amount. It is in virtue of this property, that he makes the sale; and he needs not a *venditioni exponas* to confer it. He had it before. A *venditioni exponas* only puts him in contempt for not selling. But in regard to a levy on lands, it is far otherwise. The sheriff makes no *seizure;* is not *liable* for the value; the debtor is not *discharged* to that or any amount; the sheriff acquires no possession. He only sells the defendant's estate in the lands. He does not deliver possession to the purchaser as he does in the sale of goods, but only clothes him with the defendant's estate, and leaves him to acquire possession as he can. This shows very clearly, that the sheriff sells by virtue of a power, and not by virtue of a property of any kind. When therefore that which gives the power is withdrawn, the power ceases. As a *venditioni exponas* can give no power to sell, it is argued that *ex necessitate* the power given by the *fi. fa* must remain. The argument would prove much, were it true. For altho' it is admitted, that a *venditioni exponas* confers no power to sell in the case of a chattel

A *fi. fa.* vests a property in goods seized under it in the sheriff, but as to land it confers upon him only a power to sell.

Goods may therefore be sold by the sheriff under a previous levy without a *venditioni*; but a sale of land without such authority is inoperative.

levied on under a *fi. fa.* because the power existed before, and therefore could not be conferred again, yet where the power did not exist before, that reason fails; and if not conferred by the *venditioni exponas*, it does not exist. The reason *ex necessitate* is therefore turned against the defendant. In these cases we have considered, and must consider that a *venditioni exponas*, or order of sale, by whatever name it be called, changes its character from that which it bears where there has been a levy on goods. There it confers no power to sell, because the power existed before. But in the case of a levy on lands, it confers the power of sale, for the very contrary reason. Where goods are levied on under an attachment, and they are afterwards ordered to be sold; or where lands are levied on by a constable, and returned to court, and ordered to be sold, the order of sale, whether it be called simply by that name, or *dignified* with the name of *venditioni exponas*, is the writ which gives the sheriff power to sell. The very same reasoning is applicable to an order to the sheriff to proceed to sell land levied on by a *fi. fa.* which has been returned, and the power of acting under it thereby withdrawn or expired. So also where an heir is sued on his ancestor's bond, and he confesses and sets out assets, and the plaintiff accepts them, a *venditioni exponas* or order to sell them issues. And certainly in this case no power existed before, and independently of the writ.

As to the sheriff's having in his hands writs of *fi. fa.* against the same defendant, at the instance of the Cape Fear Bank, that gave the sheriff no power to sell. For he was directed by the agent of the Cape Fear Bank not to sell under them. And this order given by parol without withdrawing the writ, was good; at any rate the sheriff obeyed the order and did not act under the writs. And this is not like a case where a person has various powers to do an act, and does it, a misrecital of the power afterwards, under which power he could not rightfully do it, will not vitiate the act. He *did* it under *all*; and if *either* was good, the act is effectual; and his misrecital shall not prejudice. He did not act nor profess

If a sheriff has several writs against the same defendant and does not sell under one of them, that writ cannot aid the title of a purchaser under the others, although the money arising from the sale is applied to its satisfaction.

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to act under the bank executions. The directions of the agent were good without paying the fees; and especially if acquiesced in by the sheriff.

We cannot examine into the grounds of the decisions in our sister states, for want of their laws in regard to these writs of *fi. fa.* There must be something in them to warrant the decisions, or we misunderstand the common law.

It is asked, if the sheriff made a levy on lands, and went out of office, is he to sell? I imagine not. Indeed I say not. And yet if the plaintiff's argument is sound, he must. And if so, all sales made by succeeding sheriffs, where their predecessors had made a levy on lands, would be set aside. For they have uniformly been made by the successors, under writs of *venditioni exponas*. Nor will the application of the surplus in the sheriff's hands (after applying what he chose to the *venditioni exponas*) to the bank executions, alter the case; that is, make it a sale under the bank executions. This is only matter of evidence, and is entirely contradicted by the full proof to the contrary. As this case is to go back for a new trial, I imagine that it is within the power of New Hanover County Court to affix their seal to the *venditioni exponas* now, if it was omitted by mistake; that is, if it was intended, the *venditioni exponas* should be a genuine writ. I make this suggestion, that the parties may meet on equal terms at the next trial.

Where a sheriff levies a *fi. fa.* on land and goes out of office, a *venditioni* must be directed to his successor.

Per Henderson, C. Justice. Where the sheriff has acted under an unsealed writ, the court from which it issued, may after its return render it valid by affixing the seal.

Per Curiam.—Judgment reversed.

The Justices of Cumberland
v.
John Armstrong *et al.*

The acts of Assembly which direct the justices of the County Courts to take bonds in certain cases, confer on them, as to such bonds, a corporate character; and they may take a bond from one of their number to themselves.

This was an action of debt, upon the bond for £2000, given by the defendant *Armstrong*, for the faithful discharge

of his duties as clerk of Cumberland County Court.*

The cause was argued by *W. H. Haywood*, for plaintiff, by *Badger*, for defendant.

RUFFIN, Judge.—It is to be hoped, that the perplexing questions on official bonds, which have frequently arisen of late, will not have a much longer continuance, since the new act directs them to be given to the Governor. Perhaps all difficulty would be most effectually cut up by the roots, by making them payable to the State at once.

After all our endeavors, we are unable to sustain this action. It is a suit on a clerk's bond for £2000, payable to the justices of the peace for Cumberland county. The writ is brought by A, B, C, &c. *nominatim*, as the successors of those who were justices at the time the bond was given. And *McMill*, one of the obligors, was also then a justice.

We have no doubt that when a statute directs an official bond to be payable to a class of official persons, it may and ought to be taken to them, by their name of office; and in that name, they may sue on it. The statute confers upon them a corporate character *pro hac vice*. And the capacity to take implies that of bringing suit. And in such case, the bond is not invalidated by reason that one of the obligors is one of the justices. For a corporator may give his bond to the corporation, which has a contracting capacity, distinct from that of the individuals who compose it. If this bond had in other respects conformed to the statute, a suit might have been sustained, in the name of the "Justices of the County Court of Cumberland."

* This cause was decided several terms ago, but the record certified to this court was mislaid and is supposed to have been lost in the fire, which destroyed the State House. The report was delayed in the hope of being able to supply the loss; but the reporter is informed that the original was also destroyed in the fire at Fayetteville. These circumstances are mentioned to excuse the omission of a statement of the pleadings and facts, of which the reporter knows nothing, except as they can be gathered from the opinion of the court.

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A bond payable to the justices of a county, which is not taken according to the directions of act authorizing it, may be supported as a valid bond at common law.

We also think the bond might be good at common law, as one payable to the individuals who were justices. There is no contradiction in this. The same bond, it is true, cannot be held to be payable to the justices as a corporation, and as individuals. As a corporation, they are unlike those expressly created by charter. They have a general contracting capacity, limited only by the restrictions of the charter. But when the corporation arises by inference, in order to support a contract, which, as a class, they are directed by statute to enter into, they constitute a corporation solely for that single purpose; and if the contract is not within the statute, they do not contract as a corporation. Such is the case here, because the penalty of the bond is too large. The bond is therefore at common law. As such we would support it, for the justices of a particular county cannot be said to be an indefinite multitude, since it is so readily made certain, who they are. And a deed may be made to persons, as well by description as *nominatim*; for after all, names are but a more precise description.

But there are two other objections, each of which is fatal to the plaintiffs. The one is, that this suit is brought by the successors, *nominatim*, of the justices to whom it was given. The obligation belonged to them individually, and comes to the surviving obligees or obligee, when we consider it a common law contract. These plaintiffs therefore cannot sue. The other is, that *McMill*, one of the obligors, is also an obligee. If an individual give his bond to another individual and himself, it is void. It is certainly so, if the obligees be mentioned by their proper names. So it is, if it be by description, which includes him. Thus a note to a *firm*, of which he is a member, is void. (*Pearson* v. *Nesbit*, *ante* 1 *vol.* 315. *Mainwaring* v. *Newman*, 2 *Bos. & Pul.* 120.) So I think it is, if payable to a class of persons, of which the obligor is one. If I give my bond to "my father's children," upon what ground shall I be excluded? Is there any intention that I shall not have a share? It is said, there is, or at least it must be inferred, in order to sustain the contract. The same reason extends to the bond to the

But an action must be brought on it in the name of the surviving obligees, and not in that of the successors.

And if one of the obligees be a justice at its execution, it is void as to all.

The case of *Pearson* v. *Nesbit*, (*ante* 1 *vol.* 315) approved by RUFFIN, J.

firm. And the intention seems to be, that "the children," *as a class*, should have the benefit of the thing to be done, in which I am to participate. That it is, which makes the bond void; because it cannot be enforced, without naming me both as plaintiff and defendant. The same principle extends to the case before us. It may be said, and very truly, that here no benefit could be intended to *McMill* as an obligee, because none of the obligees are beneficially interested; for the bond is taken in trust on its face. That intention will make no difference; for if it went on that, the bond would not be good at common law at all: since the intention was to give a bond under the statute, and such a bond only. We hold it to be good at common law, contrary to the actual intention; because as a common law bond, it may enure to some purpose, since in fact there are obligors, obligees and a thing to be done. But if, upon its face, it cannot be sustained at common law, it must share the same fate then, as under the statute. We cannot say, that the parties did not intend to make *McMill* an obligee, when he is in fact made one, as much as any other of them is. The point in question was directly ruled in *Justices* v. *Shannonhouse*. It was of such consequence, and the rule is likely to produce such mischief, that we have been willing to re-examine it, and overrule it, if possible. But that case stands upon ground that cannot be shaken. It is the gross injustice that is done by the rule, which makes one hesitate, not the doubt of the law.

PER CURIAM.—JUDGMENT AFFIRMED.

THE JUSTICES OF CURRITUCK v. DENNIS DOZIER *et al.*

A bond, made by a guardian and his sureties to A, B, and the rest of the justices, is not in pursuance of the act of 1762 (*Rev. c.* 69, *s.* 7) and can be supported only at common law. If one of the obligors be a justice at its execution, it is void as to all.

This was an action of DEBT upon a guardian bond. The bond was made payable to "*Willis Etheridge*, Jo-

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seph Ferebee and the other justices of Currituck county." Upon *oyer* had, and *non est factum* pleaded, it was proved that *Dozier*, one of the obligors, was at the execution of the bond a justice of the peace. The action was brought in the name of those justices who were in office at its commencement.*

Kinney and *Devereux*, for the plaintiffs.

Hogg, contra.

Ruffin, Judge.—The principal question in this case has been already decided in *Justices of Cumberland* v. *Armstrong et al.* at this term. The act of 1762 (*Rev. c.* 69. *s.* 7) directs a guardian bond to be made payable to the "justices present in court, the survivor or survivors of them, their executors or administrators". Under the statute therefore, the bond is nothing more than a common law bond, payable to inviduals and their personal representatives, in trust for another. This being the case, this bond must be taken to have been given to the individuals who were justices, by the description of their office. *Dozier*, then, was both obligor and obligee, and the bond is void. There has been an attempt to distinguish this case from that of the *Justices* v. *Armstrong*, by the circumstance that it is payable to "*Willis Etheridge, Joseph Ferebee, and the other justices of Currituck county.*" This is said to exclude, by necessary implication, that justice who was obligor; as if it had been expressed, "the rest *except Dozier.*" That depends upon what the word "rest" refers to. It is introduced in that part of the bond, in which the obligees are set forth, and was designed to describe them; and it plainly refers to the obligees, *Etheridge* and *Ferebee*, who are expressly named, and was designed to include, and does include as obligees all that class of persons, of which those two form parts. This is the plain and obvious grammatical construction of the words; and we cannot imply an intention of the parties, or insert an exception against those words. Per Curiam.—Judgment affirmed.†

* The record in this case also was lost, and the reporter is therefore unable to give a more particular statement of the facts.

† The case of *the Justices of Martin* v. *Stewart*, was in every respect similar to the above, and the same opinion was filed in both.

THE JUSTICES OF CHOWAN, *upon the relation of* JOHN SPENCER *et ux.* v. JOHN BONNER. Dec. 1831.

A bond payable to the justices of a county, executed by several persons, one of whom is a justice of that county, is void as to all the obligors.

This was an action of DEBT, tried on the last circuit, before MARTIN, Judge.

Upon *oyer* the bond was set forth *in hæc verba*:— "Know all men, that we, *Henry Holmes*, *John Bonner* "and *Baker Hoskins* are held and firmly bound unto "*Exum Simpson*, Esquire, and the rest of the justices "assigned to keep the peace of the county of Chowan, "in the full sum of &c. to which payment well and truly "to be made, we bind ourselves, our heirs, executors "and administrators, jointly and severally by these "presents. Sealed, &c."

The condition was, that the obligor, *Holmes*, should improve the estate of the wife of the relator as her guardian, and should pay it over at her full age.

Several pleas were entered for the defendant, but the cause being decided upon that of *non est factum*, it is not necessary to state them or the breaches assigned by the plaintiffs. The original plaintiffs were those justices of Chowan, who were the survivors of the obligees at the date of the writ, and among them was *Baker Hoskins*, one of the obligors. On the trial it was proved that *Holmes* and *Hoskins*, two of the obligors were justices at the execution of the bond, upon which his Honor nonsuited the plaintiffs, who appealed.

Iredell, for the plaintiff, contended, 1st, that a bond might be void as to one of the obligors, and yet good as to the others; that where the bond was joint and several, it had the same effect as if each obligor had executed a separate bond.

2d. That the defendant could not avail himself of the objection under the general issue.

No counsel appeared for the defendant.

RUFFIN, Judge.—This case comes directly within the decision in the four cases of *The Justices* v. *Shannonhouse*,

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(*ante* 2 *vol. p.* 6,) *The Justices* v. *Armstrong*, *The Justices* v. *Doxier*, and *The Justices* v. *Stewart*, and must therefore abide the rule there laid down. It has been argued that there is a difference, because *Bonner* alone is sued here; and it is said, that the objection must be pleaded in abatement, and cannot be taken on the general issue. But those cases did not turn on the fact, that some of the obligors who were justices were jointly sued, but that the same person was a co-obligor with others, and also one of the obligees; which rendered the bond void. It is not like the cases cited of bonds by a *feme covert*, or a man professed and another. There the incapacity is personal, and does not affect the obligor who is able to contract. But here the question is, whether a joint and several bond by A and B to A is good, as the bond of either. There can be no delivery to an obligee by himself; nor by one obligor to another obligor. It is like the case of the same person being plaintiff and defendant. No judgment can be rendered in such a case. If it be, it is a nullity. (*Pearson* v. *Nesbit*, *ante* 1 *vol.* 315.) That indeed was a writ of error; but it was one *coram nobis* for error in fact, not of law; and was necessary only to identify the person of the same name, who was both plaintiff and defendant, to be the same person. If that had appeared on the record, the judgment would have been vacated, or set aside on motion as being null. There seems to be no difference between the validity of a judgment and a bond, as affected by this objection. For if the bond would be good as to one, so would the judgment. The true reason governing both and making both void is, that there must, in the nature of things, be parties to both contracts and judicial proceedings.

A personal incapacity of one obligor does not affect the validity of the bond as to the others; but it is otherwise where one of them is both obligor and obligee.

The case of *Pearson* v. *Nesbit* (*ante* 1 *vol.* 315.) approved by Ruffin, J.

If this be correct, *non est factum* is the proper plea. There cannot be a plea in abatement, that the other obligor is not sued; for that would not be giving the plaintiffs a better writ, since the obligor not sued is one of the obligees, and he cannot sue himself. The objection is, that the instrument is *void in toto*, and therefore not the deed of any of the parties. It is like the case of a joint and several obligation of two, cancelled as to one

by tearing off his seal. It avoids it as to both; tho' it would be different if they were severally bound. (*Pigot's case*, 11 *Co.* 28.) The reason is, the parties intended to have contribution. So here, it never could have been intended, that one of the persons who sealed the instrument, should alone *pay to the other* the money mentioned in it. And because it cannot be enforced without that construction, it must be taken to be void altogether.

PER CURIAM.—JUDGMENT AFFIRMED.

HENRY FITTS, *on the relation of* EDWIN SLADE *v.* JOHN H. GREEN *Ex'r. of* SOLOMON GREEN.

Where an order of the County Court allowed a guardian to renew his bond with A and B, his sureties, and a bond not drawn according to the statute as an official bond, but good in its form as an obligation at common law, was sealed by A only and left with the clerk, it was held that a delivery could not be inferred, there being no evidence of an actual delivery.

This was an action of DEBT, and upon OYER the bond was as follows:

"Know all men by these presents that we, *Robert R. Johnson*, *Solomon Green* and *John C. Johnson*, are held "and firmly bound unto *Henry Fitts* and other justices "of the Court of Pleas and Quarter Sessions for the "county of Warren, in the sum of &c. to be paid to the "said justices, or the survivor or survivors of them in "trust &c. for which payment well and truly to be made "we do hereby jointly and severally bind &c." with the usual condition that *Robert R. Johnson* should faithfully discharge the duties of guardian to the relator. The bond was signed by *Robert R. Johnson* and *Solomon Green* only. The defendant pleaded *non est factum testatoris*; and upon the trial the case was, that at the term of the County Court at which the bond was taken, the following entry appeared upon the minutes of the court: "*Ro-* "*bert R. Johnson*, guardian to *Edwin* and *Eliza Slade*, "renewed his bond as such, in the sum of four thousand

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"dollars each, with *Solomon Green* and *John C. Johnson* "his sureties." When the court opened that morning, *Henry Fitts*, *Dennis O'Brien*, *Burwell P. Achford* and *David Terry* were the justices in court, and there was no evidence that other persons were on the bench when the entry was made and the bond taken. The clerk of the court deposed that he or his deputy attested the execution of official bonds, but that he had no recollection whatever touching the execution of the bond in question. There was no attesting witness to the bond. It was proved that both *Green* and *John C. Johnson* were the sureties to the former bond of *Robert R. Johnson*. It was admitted that *Robert R. Johnson* was a justice of the peace for the county of Warren, when the bond was executed.

It was contended for the defendant,

1st. That there was no evidence of a delivery of the bond to be left to the jury—that considered as an office bond, there was no evidence that the court had accepted it—that considered as a bond at common law, there was nothing from which a delivery to *Fitts* could be inferred, and that all the circumstances of the case contradicted such inference.

2d. That the plaintiff could not recover, because the bond was payable not to him alone, but to other persons not joined with him in the action, and that among these persons was *Robert R. Johnson*, who was also a co-obligor.

For the plaintiff it was insisted, that the words "other justices" did not import all the other justices, nor define what number or description of them was intended; and being entirely uncertain they ought to be rejected, and the right of action would then be in the plaintiff.

At the suggestion of his Honor, Judge Swain, this point was reserved, and the jury were instructed upon the first point made by the defendant, that they might infer from the facts of the case a delivery of the bond to the plaintiff. A verdict was returned for the plaintiff; but upon the matter reserved, his Honor being of opinion with the defendant, ordered it to be set aside and a nonsuit to be entered, whereupon the plaintiff appealed.

Hall, with whom was *the Attorney General*, for the plaintiff. The most formidable objection to the plaintiff's claim is presented upon the bond itself. The plea of *non est factum* makes it incumbent on the plaintiff to prove the execution of such a bond as is described in the declaration, which states a bond given by the defendant, payable to *H. Fitts*, chairman. The one offered in evidence in support of this allegation, is payable to *H. F.* chairman, and "other justices of the peace for the county of Warren." The question then is, do the words "other justices" &c. import any thing, or are they merely surplusage, and therefore to be rejected as such, leaving it a bond payable to *H. F.* alone? If the last is the proper construction of the instrument, the action may be maintained so far as respects the objection of variance. If the words "other justices" cannot be rejected as immaterial, but are interpreted to signify other obligees under a general description, the plaintiff must fail, because the bond declared on, if this construction be given, does not agree with that exhibited on the trial, and the variance will be fatal. In answer to the objections of variance, we must show that *H. F.* is the sole obligee, and this we can only do by rejecting the words that immediately follow his name, to-wit: "other justices." The omission of the article "the," before "other justices," is the only circumstance, by which the case can be distinguished from the cases decided by the Supreme Court, and relied on in the court below. This circumstance is important enough to furnish a ground for saying, that the two cases are unlike. *A. B.* chairman, "and the other justices," of such a county, are descriptive of a class of men, who may be easily ascertained. That phrase points to *all* the individuals in the county, who were justices when the bond was given, and designates them as obligees with as much certainty, as if the justices had been named in the bond by their appropriate christain and surnames; as much so as a note payable to *A. B. & Co.* does the members of the firm which they compose. But in this case, giving a strict grammatical construction to the words "other justices," it is difficult to determine, upon reading the

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bond, which of the justices of the county of Warren, in addition to the chairman, were designed to be comprehended under the general denomination, which may embrace all, or a less number than all. That term has no *certain* reference to *all* of the justices, as the words in the case decided by the Supreme Court did, but to *all* or *some* of a body of magistrates consisting of many members, but to whom, or what number of those members, is uncertain. In the case decided, the description, though general, was definite, and marked with unerring certainty who were meant, and by such description the obligees could be ascertained; the rule, therefore, *id est certum quod potest reddi certum* applied, and rescued the instrument from impeachment for ambiguity, as to the other obligees whom the parties had in contemplation. But in our case this maxim cannot apply, in consequence of the indefiniteness of the expression, "other justices," which, without the article "the" before it, furnish no clue to guide us in our search for the parties intended to make co-obligees with *Fitts*, but which they failed in doing; the words then being ambiguous they ought to be rejected, and the bond regarded as payable to *Fitts* alone.

As respects legal certainty and grammatical precision of language, I see no difference between A. B. and other justices of a county, and A. B. and other justices of the State of North Carolina. There would be a greater probability of finding out who were meant in the one case than in the other, if parol evidence were admitted to explain the ambiguity, as the enquiry in the former case would be limited to a smaller compass as respects space, and to fewer individuals. But the expressions in both cases, unaided by *matter dehors*, are equally indefinite. I therefore think that the case relied on does not decide this to our prejudice—so far from it, the decisions may be cited in our favor. The reasoning of Judge Ruffin seems to proceed upon the idea, that the justices of the county were embraced by the term, "the other justices," which is sufficiently large to include all, and sufficiently definite with the help of the particle "the" to designate each. But the term, in our bond, is neither extensive

enough to include all the justices with *certainty*, nor definite enough to point out which of them were meant, other than or besides *H. Fitts*. If at the time when this bond was executed, the law had required it to be taken payable to all the justices of the county, the court might presume that the County Court intended to do their duty, and might construe it a bond payable to all the justices according to such presumption. This construction it might properly receive, if there was no other alternative between such a construction and declaring it a nullity, *ut res magis valeat quam pereat*. Or if the minutes of the County Court set forth who were the justices on the bench when the bond was executed, upon the same presumption, (for at that time the law required such bonds to be taken payable to the justices in court on the bench,) the word "others" might perhaps be referred to the justices then on the bench; but as it does not appear who were on the bench at the time, the facts will not sustain this construction. And to construe it as a bond payable to *all* the justices, (which derives no support from the presumption that the magistrates intended to discharge their duty, for that was not the form which the law prescribed for the bond at the time,) will be explaining or rather aiding a *patent* ambiguity to the destruction of the bond, and the rights it was designed to protect. The only remaining alternative is between the last construction and the upholding of the bond by the rejection of the ambiguous phrase, as too uncertain to admit of a sensible meaning, and therefore regarding it as inoperative and void.

If there be any doubt or repugnancy in the words of a grant, such construction is to be made as is most strong against the grantor, because he is presumed to have received a valuable consideration for what he parts with. (*Co. Litt.* 314 *b* 146. 2 *Roll. Abr.* 65. *Plowd.* 154. 171.) Words if they cannot operate in one form, shall operate in that which, by law, will effectuate the intentions. (*Goodtitle* v. *Bailey*, *Cowper* 600. *Jackson* v. *Beach*, 1 *Johns. Ca.* 399, 402. *Barnes* v. *Irwin*, 2 *Dal.* 199, 203.) Or they may be rejected where they are merely insensi-

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ble. (*Smith* v. *Parkhurst*, 3 *Atk.* 136. *Parkhurst* v. *Smith*, *Willes.* 332.)

Where it is impossible the grant should take effect according to the letter, there the law will make such constructions that the gift by possibility may take effect. (*Co. Litt.* 183 *b*).

Upon the issue submitted, proof of the hand writing of a party to a deed is strong evidence for a jury to presume a delivery. (*Peake's Evid.* 100. *Lesher* v. *Levan*, 2 *Dal.* 96).

Delivery to a third person, for the use of the grantee, and without his knowledge, becomes a valid delivery on the subsequent assent of the grantee which relates back to the subsequent time of delivery. (13 *Johns. Rep.* 285. 4 *Day* 66. 9 *Mass. Rep.* 307. 5 *Munf.* 160. 12 *Mass.* 456. 18 *Johns.* 544. 1 *Johns. Ca.* 388. *Id.* 240, 450. 2 *Stark.* 477).

A deed may be delivered by words, or by acts, and may be good if delivered to a stranger without special authority, if intended for the use of the grantee. (12 *Johns.* 536. 2 *Roll. Abr.* 24, 42).

Seawell, Gaston, Badger & W. H. Haywood, for the defendant.

HENDERSON, Chief-Justice.—I agree with the counsel for the plaintiff, that the words *other justices* neither import all the justices, nor any definite number of them. It may be satisfied with less than all of them; and therefore may mean any two, or any greater number of them. It does not necessarily import all, as the words *the justices* do. *Henry Fitts* is therefore the only obligee. For it is the same as if it had been payable to him and "other people," or to him and————, (leaving a blank). And the certain description is not vitiated by an uncertain one. The action is therefore brought in the name of the only obligee. There are no others. And the words "to be paid to the said justices" are also to be rejected, as referring to the uncertain and indefinite description, *other justices*.

Per HENDERSON, C. J. A bond payable to "A. B. chairman and other justices of the court" &c. is in law payable to A. B. alone.

But in this case, there is no evidence of a delivery. None was given of an actual delivery to *Fitts*. For the

clerk is his agent for the delivery of official bonds only, which this is not. And from the whole case it is evident, that it was intended that *John C. Johnson* was to sign it also. It is a fair and reasonable presumption, in the absence of all proof of an actual delivery to the obligee, that he whose name is mentioned, both in the body of the bond and the minutes of the court, as a co-obligor, I mean *John C. Johnson*, was also to sign it; and that upon the condition, that he also signed and became bound, was *Green* to become bound. Common sense and common experience, and justice to *Green*, require this exposition of the transaction.

As to the meaning of the words *other justices*, and who is the obligee or obligees, I have expressed my own opinion only, the case being decided by the court, on the other ground; that is, that there was *no evidence of a delivery*.

PER CURIAM.—JUDGMENT AFFIRMED.

OWEN WILLIAMS *et al.* v. JOHN C. EHRINGHAUS *et al.*

Bonds intended to be official, but which are not in conformity to the statute, may be declared on as voluntary bonds at common law.

The case of the *Governor* v. *Meilan*, (2 *Law Rep.* 460.) and the *Governor* v. *Witherspoon*, (3 *Hawks* 42,) approved.

After the new trial granted in this case, (*ante* 2 *vol.* 511) the cause was tried again on the last circuit, before his Honor, Judge MARTIN, at Pasquotank. The only question made in the case was, whether the County Court had a right to take the following bond: "Whenever the Court of Pleas and Quarter Sessions for the "county of &c. shall require, we the undersigned, jointly and severally, promise to pay to the justices of said "court or their order, the sum of &c. In witness where- "of we have &c."

The suit was brought in the names of the survivors of those justices, who were in office when the bond was executed.

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His Honor being of opinion for the plaintiffs, a verdict was taken accordingly, and the defendant appealed.

Iredell, for the plaintiff.

Kinney, for the defendants.

RUFFIN, Judge.—It was not expected, after the frequent decisions that bonds intended to be official, which had not that character because of some want of conformity to the statute, were not void, but would be supported as good voluntary bonds at common law, that any question would be again made upon it. *The Governor* v. *Meilan*, (2 *Law Rep.* 460) was the first case upon the subject. *The Governor* v. *Witherspoon*, (3 *Hawks* 42) and many others have followed it. And in *the Justices of Cumberland* v. *Armstrong*, it is plainly declared to be the opinion of the court, that a bond payable to the justices of a particular county is not void; for the obligees are sufficiently identified by that description. It follows, that the present bond is valid.

It is said however, that the County Court has no capacity to take such an obligation. Admit it; and what is the consequence? This bond is not taken to be given to the justices, as constituting a court, but given to them as individuals by the description of their office, instead of their names. That is the ground of all the decisions on the subject down to that of *Branch* v. *Elliott*, (*ante* 86). Unless, therefore, it is void at common law for uncertainty, it must be supported; and that it is not void for that reason has been settled in those cases. The bond directed by a statute must be taken according to it, to be proceeded on under the statute. But to take such a bond as the present, there is no necessity for a special authority. The distinction is between taking a bond without such an authority, and taking it when forbidden; as in the case of bail bonds.

A bond, payable to the justices of a court has the same validity, as if it described the obligees by name.

PER CURIAM.—JUDGMENT AFFIRMED.

THE STATE v. CATHARINE MORRISON.

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On the trial of an indictment under the act of 1816, (*Rev. c.* 906,) to prohibit the retailing of spirituous liquors by the small measure, it is incumbent on the defendant to show the existence of a license.

The defendant was indicted for retailing spirituous liquors by a less measure than a quart. On the trial, before his Honor Judge STRANGE, at Robeson, on the last circuit, the charge of selling by the small measure being fully proved by the prosecution, it was contended for the defendant, that the state must prove the want of a licence. But his Honor charged the jury, that it was incumbent on the defendant to show the existence of a licence. A verdict was rendered for the state, and the defendant appealed.

The *Attorney General*, for the state.

RUFFIN, Judge.—This appeal seems to rest on the argument, that the indictment ought, and does charge the want of a licence; and therefore the state must prove it. It is true, there is a known distinction, where an exception is embraced in the enacting clause of a statute, and where it comes in by a proviso, or by distinct enactment. In the former case, the indictment must allege, as here, that the defendant is not within the exception, because the negatives are descriptive of the offence; tho' in the latter it may be silent on that point, and the justification or excuse must be adduced in defence by the party accused. Yet the consequence claimed by this defendant cannot be yielded. The questions are very different. This is not a question of pleading. It is one of evidence. And altho' it be admitted, that the indictment must negative the existence of the licence, it remains to inquire, upon whom the proof on that point is incumbent; or rather, what is proof of the defendant's guilt. The general rule, founded on convenience and common sense, is that the affirmative must be proved. He, who alleges a fact to be, is naturally expected to show its existence; and not he, who denies it, to show that it is not. The few exceptions to this principle, as yet established, do not extend to the case before us. In the case of *Lord*

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Halifax, (*Bull. N. P.* 298,) who was accused of refusing to deliver to his successor the papers of his office, it was required that the refusal should be shown. This might be, because the law presumes that every sworn public officer will do his duty, until the contrary appears. Or it might be, that as the omission is the criminal act, it must be expressly proved; and it can be done, and ought to be done by affirmative evidence to the fact of refusal, as is the case in every instance where a previous demand and refusal are necessary, without putting the defendant to show, on his part, performance or a readiness.

There are other exceptions, where the affirmative evidence is not within the knowledge, or peculiarly within the knowledge of the defendant; as in *Williams* v. *The E. I. Co.* (3 *East* 162) and *Rex* v. *Rogers*, (2 *Camp.* 654). In all other cases, the affirmative, as being easily, explicitly and directly shown, ought to be proved. This has been held to embrace special qualifications, and licences to exercise particular trades. In *Rex* v. *Stone*, (1 *East* 639) it was admitted by *Lord Kenyon* and *Mr. Justice Lawrence*, that in an action on the game laws, no negative proof was ever given by the plaintiff, of a want of qualification in the defendant; but the affirmative lies on the latter to show such qualification. It is true, the court was equally divided in that case; but not on the general question of evidence. Those two judges thought, that on information before magistrates, the negative, a want of qualification, ought to appear on the conviction, as having been proved by the prosecutor; while the other judges held differently. I confess, I do not perceive why the modes of proof should be different before two legal tribunals; since the same conclusion is sought by each, and would seem to follow from the same evidence before both. But the concession there, (in which all agreed,) that in an action no negative evidence is necessary, is sufficient for the present case. And in the subsequent case of *Rex* v. *Turner*, (5 *M. & S.* 206,) cited in 2 *Stark. on Ev.* 627, *note h*, the distinction between actions and informations before magistrates is disallowed, and the *onus* thrown alike in both instances on the defendant, as alleging the affirmative. This is a strong example; be-

cause there are divers disqualifications under the game laws, some of which may involve complicated inquiries into the title to estates, the exercise of manorial rights, and the due appointment of game-keepers. But the principle applies much more forcibly, where the point in dispute is the existence of a single and simple written document, which, if it exist at all, must be in the possession of the defendant. In such a case, the failure to produce the paper is, according to all experience of the motives and actions of men, proof that there is none such; which consideration induced me to say, that the question was rather, whether there was legal proof of the defendant's guilt, than whether the proof should come from one side or the other. The refusal or omission to exhibit written evidence, which the party alleges to exist, and to be in her exclusive power and possession, containing a plain authority for her acts, creates a legal and plenary presumption against her. It seems, in and by itself, to be conclusive proof. Accordingly in *Rex* v. *Smith*, (3 *Bur* 1475,) it was held, that where a person admits before a magistrate the main fact of trading as a hawker and pedler, he must prove that he had a licence. It is remarkable that this was decided by *Lord Mansfield*, upon a conviction on an information, altho' in the case of *Rex* v. *Jarvis*, relied on by *Lord Kenyon* in the case of *Rex* v. *Stone*, he held that negative evidence must be given by the prosecutor, on an information under the game laws. This shows, that in *Smith's* case, he considered the fact of not producing equivalent, as a matter of evidence, to not having the licence. It is true, the statute on which that conviction was founded, provided both for the party's not having a licence, and not producing it to a justice of the peace, when demanded. But the conviction was for *not having* the licence in that case, and the evidence to prove that fact was stated by the magistrate in the conviction, to be the acknowledgment of trading, *and the refusal to produce the licence on that trial*; and the court refused to quash.

Such I always understood the rule to be, on trials for retailing without licence, when on the circuit.

PER CURIAM.—JUDGMENT AFFIRMED.